

Review of the Nova Scotia Public Prosecution Service

REPORT ON THE WESTRAY PROSECUTION

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March 2000

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March 31, 2000.

The Honourable Michael Baker
Minister of Justice and Attorney General
5151 Terminal Road, PO Box 7
Halifax, NS

Dear Minister:

Re: Westray Prosecution

I am pleased to attach the Report prepared by Duncan Beveridge, Q.C., and Patrick Duncan, Q.C., of their Review of the Public Prosecution Service's efforts in *R. v. Curragh, Inc., Phillips and Parry* (the "Westray Prosecution").

As I pointed out in June 1999 in the Introduction to my Final Report of the Review of the Nova Scotia Public Prosecution Service, in order to fulfil my mandate "it would be necessary ... to examine the involvement of the Director Public Prosecutions and the PPS in at least one specific case," the Westray Prosecution.

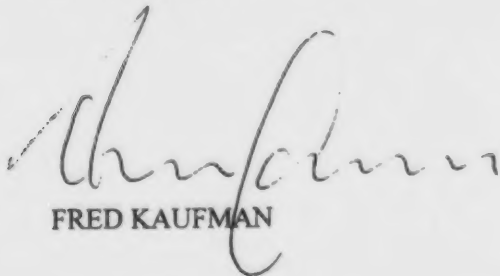
I requested Messrs. Beveridge and Duncan to undertake this task (which I described at the time as "monumental"), and since it was clear that their inquiries would not be completed for some time, I decided (with the Attorney General's agreement) not to await their Report and to present my findings when ready "so that, should the government so wish, the changes I propose may be implemented more quickly."

I indicated at the time that I would continue to work with Messrs. Beveridge and Duncan, and this is how we proceeded. Their Report, therefore, includes my input, and the recommendations they make have my approval.

This is the final chapter in my Review of the Nova Scotia Public Prosecution Service, and I am pleased to note that many of the changes I recommended last June have already been acted upon. As I said then, and I repeat now, "existing problems can and will be overcome ... [and] ... with time, goodwill and effort the PPS can ... become a showcase for the legal profession, providing not only good and efficient service to the public, but also attractive career opportunities for young and competent lawyers."

It is our hope that the present Report will assist the PPS in this task, and help avoid similar problems in future. We also hope that the detailed account of all phases of the prosecution, together with the comments of the authors, will provide the public with answers to most, if not all, the questions asked about this case.

Sincerely yours,

A handwritten signature in cursive script, appearing to read 'Fred Kaufman', written in dark ink. The signature is fluid and somewhat stylized, with a large initial 'F' and a long, sweeping underline.

FRED KAUFMAN

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March 29, 2000

The Honourable F. Kaufman, C.M., Q.C.
439 University Avenue
Suite 1900
Toronto, Ontario
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Dear Mr. Kaufman:

Re: Report on the Westray Prosecution

We are pleased to submit to you our final report on the Westray prosecution. We would be remiss if we did not acknowledge the excellent cooperation we received from the lawyers and staff of the Public Prosecution Service, as well as from the many others from whom we sought information or input. Without this level of cooperation and assistance our task would have been that much more difficult.

Yours very truly,


Duncan R. Beveridge, Q.C.


Patrick J. Duncan, Q.C.

DRB/ra

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PREFACE

In 1998, the then Minister of Justice for the Province of Nova Scotia, Dr. Jim Smith, retained the Honourable Fred Kaufman to review the Public Prosecution Service (PPS). This review was completed in mid-1999, and Mr. Kaufman's Report was published on June 9th, 1999.

An aspect of this Review was an examination of the PPS's handling of the case of *R. v. Curragh, Phillips and Parry*, commonly referred to as the "Westray" case.

The history of this case has been well-publicized, but a brief synopsis is appropriate. The Westray coal mine, a division of Curragh Resources, was operating in Pictou County, Nova Scotia, when, on May 9, 1992, a massive explosion killed all 26 men then working underground.

Following the explosion a significant, though futile, rescue operation was launched. In the ensuing days, weeks and months, the Department of Labour and Royal Canadian Mounted Police investigators began the task of trying to determine the cause or causes of the tragedy. Searches of the mine, the mine offices and other relevant locations were conducted, exhibits seized, witness statements taken and expert advice sought.

Concurrently with these investigations, Justice Peter Richard of the Nova Scotia Supreme Court was appointed a Commissioner under the *Public Inquiries Act* and a Special Examiner under the *Coal Mines Regulation Act*, with broad powers to inquire into the operation of the mine and the explosion of May 9, 1992.

On October 5, 1992, fifty-two charges were laid under the *Occupational Health and Safety Act* and the *Coal Mines Regulations Act* by Department of Labour investigators, alleging that Curragh Resources, Roger Parry, Gerald Phillips and others had, in the operation of the mine, contravened certain provisions of those Acts. The then Director of Public Prosecutions, John Pearson, personally assumed carriage of the prosecution of the provincial charges.

It was evident to Mr. Pearson that the RCMP investigation could lead to the laying of new charges against the company and some of its employees, alleging serious offences contrary to the provisions of the *Criminal Code*.

In Mr. Pearson's opinion, there were concerns that proceeding with the Department of Labour charges could jeopardize, if not preclude, a prosecution of the proposed *Criminal Code* offences against the same accused persons. To avoid this potential problem, a decision was made not to proceed on the Department of Labour charges but, rather, to pursue the *Criminal Code* charges, if and when they were laid.

On December 10, 1992, 34 charges contrary to the *Occupational Health and Safety Act* and the *Coal Mines Regulations Act* were stayed by the Director of Public Prosecutions. On April 19, 1993, the balance of the charges under those two Acts were similarly discontinued by way of a Stay of Proceedings by the Crown.

The following day, April 20, 1993, charges of manslaughter and criminal negligence causing death were laid. In essence, these charges alleged that Curragh, Mr. Phillips and Mr. Parry had, by their alleged criminal conduct, been responsible for the deaths of the 26 underground miners.

The prosecution was a considerable undertaking and has been described as the largest single case of its kind in Nova Scotia. Significant resources were committed to the case as it wound its way through the Courts. Initially, a two-person team was assigned, but this was later replaced by a four-

lawyer team headed by Herman Felderhof. The trial commenced on February 6, 1995, before Justice N.R. Anderson and ended with a judicially ordered Stay of Proceedings on June 9, 1995. The trial judge's decision was based on allegations that the PPS had failed to properly disclose information to the accused and other perceived misconduct.

The Stay was successfully appealed by the Crown and a new trial was ordered by the Nova Scotia Court of Appeal on December 1, 1995. A further appeal to the Supreme Court of Canada by the accused was dismissed on March 20, 1997, and the Court of Appeal's Order for a new trial was confirmed.

In late 1995 and early 1996 another group of prosecutors was brought together for the purpose of preparing and conducting the anticipated new trial. That team consisted of six lawyers, together with various paralegal, secretarial and technology support staff. That team's work ended in June of 1998 with a recommendation that the prosecution should be discontinued on the basis that, in its opinion, there was not a reasonable chance of conviction should the charges proceed to trial.

The recommendation to enter a Stay of Proceedings was unanimously arrived at by the Westray prosecution team and approved by the Acting Director of Public Prosecutions, Martin E. Herschorn, Q.C.¹ Mr. Herschorn reported, in writing, to the Minister of Justice the Public Prosecution Service's intention to enter the Stay of Proceedings. Mr. Herschorn, together with a member of the prosecution team, then met in person with the Attorney General, Dr. Jim Smith, to answer any questions he might have. Following this meeting, the Minister concluded that he would not intervene in the prosecution.

The Acting Director of the Public Prosecution Service recognized that it was appropriate to do a review of the entire prosecution following the entering of the Stay, and announced at a press

¹ Mr. Herschorn became acting Director of Public Prosecutions shortly after Mr. Pitzul left as the Director of Public Prosecutions on April 1, 1998, to assume the position of Judge Advocate General.

conference on June 30, 1998, the preparation of two reports; the first to assess the work of the prosecution team in place through the period of approximately 1993 - 1995, and the second to review the work of the prosecution team in place for the period of approximately 1995 - 1998.

The original plan was that these reviews would be conducted separately, with the 1993-1995 period being examined by counsel from outside the PPS, and the 1995-1998 period report to be prepared by PPS lawyers who acted on the file in that time frame. Both reports were to be submitted to the Acting Director of Public Prosecutions.

At about the same time, news headlines were being generated about the Public Prosecution Service handling of two other 'high profile' cases, *R. v. Gerald Regan* and *R. v. Dr. Nancy Morrison*.

Crown Attorneys were voicing long-standing grievances over working conditions and compensation.

Against this back-drop, the Minister of Justice appointed The Honourable Fred Kaufman to study the Public Prosecution Service. It became clear to Mr. Kaufman that in order to fulfill his mandate it would be necessary for him to examine the PPS's handling of the Westray prosecution. We were retained to carry out this task under Mr. Kaufman's supervision. It was recognized that the review of the Westray prosecution would take considerable time. In Mr. Kaufman's report of June 1999, he noted:

As I said in the Interim Report, it quickly became clear to me that even though the Terms of Reference are generic in nature, it would be necessary, in order to fulfil my mandate, to examine the involvement of the Director of Public Prosecutions (the "DPP" or the "Director") and the PPS in at least one specific case, R. v. Curragh Inc., Phillips and Parry, (hereinafter referred to as Westray). Toward that end I engaged the services of two distinguished Halifax barristers, Duncan Beveridge, Q.C., and Patrick Duncan, Q.C. Their inquiries will not be completed for some time. Their task is monumental, and rather than wait for their report, I decided (with the Attorney General's agreement) to present

my findings now so that, should the government so wish, the changes I propose may be implemented more quickly. I will, however, continue to work with Messrs. Beveridge and Duncan, who will report their findings to me. I will analyse them, and make such comments as I deem appropriate before passing them on to the Attorney General.

(Review of the Nova Scotia Public
Prosecution Service, Final Report, June 1999)

Upon Mr. Kaufman's appointment, the reports originally commissioned by the Acting Director of Public Prosecutions were abandoned.

Issues

While the case has generated many issues, we commenced our work setting out three general phases to be studied and reported on. They were:

1. What were the principles that were applied by the PPS in exercising the prosecutorial discretion to enter a Stay of Proceedings?
2. Why did it take so long for the PPS to come to the conclusion that there was not a reasonable chance of conviction, and why did the first trial team not come to the same conclusion?
3. What were the problems that the first prosecution effort encountered and how did those problems relate to the judicial Stay of Proceedings that was entered by Justice Anderson in the first trial?

It is against this background that the Report which follows should be read.

D.R.B.
P.J.D.

GENERAL CHRONOLOGY

<u>Dates</u>	<u>Events</u>
May 9, 1992	Explosion in the Westray coal mine resulting in the deaths of 26 miners.
May 11, 1992	Order by Dept. of Labour to Westray to produce all records relating to the explosion within 24 hours.
May 15, 1992	Justice K. Peter Richard is appointed a Commissioner under the <i>Public Inquiries Act</i> .
May 21, 1992	RCMP commence their investigation.
May 25, 1992	Order of Commission of Inquiry for production of documents.
June 23, 1992	The north mains of the Westray mine are flooded.
September 1992	Chris Morris and Stephanie Cleary are assigned to provide pre-charge advice.
October 5, 1992	52 Charges under the <i>Occupational Health and Safety Act</i> and <i>Coal Mines Regulations Act</i> are laid by Dept. of Labour investigators.
December 10, 1992	34 charges under the <i>Occupational Health and Safety Act</i> and <i>Coal Mines Regulations Act</i> are stayed by the Director of Public Prosecutions.
February 22, 1993	Chris Morris and Stephanie Cleary ask to be relieved of the responsibility of the Westray prosecution due to concerns over under-resourcing.
March 9, 1993	Management Board approves the outstanding resourcing requests by the DPP for the Westray prosecution.
April 19, 1993	Remaining charges under <i>Occupational Health and Safety Act</i> and <i>Coal Mines Regulations Act</i> are stayed. The Westray prosecution team of Herman Felderhof, Art Theuerkauf, and Peter Rosinski is appointed.

April 20, 1993	Criminal charges of manslaughter and criminal negligence causing death are laid against Gerald James Phillips, Roger James Parry, and Curragh Inc.
May 17, 1993	Andrew Macdonald is hired as the 4th member of the prosecution team but on a 1 year contract.
May 25, 1993	First appearance in Provincial Court by Parry, Phillips and Curragh Inc. Defence motion to quash Information of April 20, 1993.
July 20, 1993	An Information dated April 20, 1993, alleging manslaughter and criminal negligence causing death is quashed by Curran Prov. Ct. J.
July 23, 1993	New Information is sworn alleging manslaughter and criminal negligence causing death.
August 17, 1993	Arraignment in Provincial court on new charges. Motion to quash the Information by Defendants.
October 26, 1993	Provincial Court Judge Curran upholds the validity of the new Information.
November 3, 1993	Phillips and Parry appear in Provincial Court. Curragh Inc. fails to appear. Phillips elects trial by judge and jury. Parry makes no election. A preliminary inquiry is scheduled to commence for Phillips and Curragh Inc., March 28, 1994.
December 2, 1993	Mr. Parry appears. An election is entered for him of trial by judge and jury. The commencement of the preliminary inquiry is set for the same date, March 28, 1994.
March 2, 1994	Parry's request to adjourn the preliminary Inquiry to get counsel is denied.
March 28, 1994	Temporary counsel for Parry advises of a motion in Supreme Court set for April 28, 1994, to have legal counsel appointed for Parry. Parry's request for Preliminary Inquiry to be adjourned is granted. Criminal charges are adjourned until May 10, 1994.

May 12, 1994	Andrew Macdonald's contract expires.
May 10, 1994	Phillips files Notice of Re-election, Notice of Waiver of Preliminary Inquiry and Consent to stand trial. Parry requests an adjournment on counsel issue. Matter adjourned until May 19, 1994.
May 16, 1994	Meeting by the prosecution team with DPP, John Pearson, regarding the preferral of a direct Indictment.
May 18, 1994	Direct Indictment is preferred.
May 19, 1994	Crown advises the Provincial Court Judge that it has filed a Direct Indictment in the Supreme Court in Pictou, together with the consent of the Director of Public Prosecutions, thereby ending all matters in Provincial Court.
June 16, 1994	Parry and Phillips arraigned in Supreme Court on Direct Indictment on charges of criminal negligence causing death and manslaughter. Both elect trial by Judge alone. No one appears on behalf of Curragh Inc. and the court enters a plea of not guilty on its behalf. Trial is set to commence February 6, 1995.
July 5, 1994	Case Management conference with Justice MacAdam.
September 1994	First prosecution team requests the rehiring of Andrew Macdonald.
September 2, 1994	First Pre-trial conference with the trial judge, Justice N.R. Anderson.
September 13, 1994	Second Pre-trial conference.
September 27, 1994	Third Pre-trial conference.
October 1994	Andrew Macdonald is rehired on a contract to May 1995 or to the conclusion of the trial.
October 18, 1994	Fourth Pre-trial conference.
November 15, 1994	Fifth Pre-trial conference.

December 2, 1994	Sixth Pre-trial conference. Crown motion to call more than 5 expert witnesses granted.
December 23, 1994	Seventh Pre-trial conference.
January 18, 1995	The defence team for Phillips demands production of all Department of Labour and related materials.
January 31, 1995	Eighth Pre-trial conference.
February 1, 1995	Pre-trial conference continues from January 31, 1995, re constitutional validity of charges and character evidence. Ruling is postponed on the constitutional validity of charges. The defence motion requesting the court to limit the ability of the Crown to call evidence of alleged prior acts of discreditable conduct is denied. Defence is provided with copies of background material on employment by Mr. Phillips, and to a lesser extent, Mr. Parry, on their employment at Alberta coal mines (which came to be called the 'Cardinal River Coal materials').
February 6, 1995	Trial opens.
February 6-10, 1995	Crown exhibits catalogued by the Court.
February 10, 1995	The Cardinal River Coal materials are ordered to be excluded from evidence and any further evidence discovered by the Crown is also excluded. An order of \$500 costs is made against the Crown for failing to disclose the Cardinal River Coal materials.
February 13, 1995	Court grants defence request to conduct a search at the mine sight.
February 28, 1995	Court orders Crown to give five days notice to the defence specifying the exhibits for each witness.
March 2, 1995	Trial Judge phones Deputy Director of Public Prosecutions requesting that he remove lead counsel at trial or he (the judge) would take steps to do so.
March 9, 1995	Crown Motion asking Trial Judge to remove himself.

March 13-14, 1995	Motion heard.
March 14, 1995	Motion denied.
April 3, 1995	Crown applies for leave to appeal to the Supreme Court of Canada from Justice Anderson's decision not to remove himself.
April 5, 1995	Supreme Court of Canada denies Crown's application for leave to appeal.
April 10, 1995	Trial recommences.
May 4, 1995	Application for Particulars by the Defence.
May 9, 1995	Order for the Crown to provide particulars of the equipment and materials alleged to have been used in an unsafe manner.
May 10, 1995	Crown provides particulars. Court rules that the particulars are not sufficient and orders further particulars to be provided. Defence files Motion for Stay of Proceedings.
May 23, 1995	Stay hearing commences.
June 1, 1995	Stay hearing concludes.
June 9, 1995	Court grants petition to stay charges and orders costs in the amount of \$150,000.00 to be paid by the Crown to the accused, Phillips. Trial ends.
June 13, 1995	Trial team meets with the Deputy Director of Public Prosecutions, the Acting Chief Crown Attorney (Trials) and S/Sgt. Ches MacDonald, RCMP. The purpose of this meeting is to outline the process to review Judge Anderson's decision, set a deadline for the prosecution team's recommendation to appeal or not; examine whether a reasonable likelihood of conviction remains and, if so, the resource consequences.
June 23, 1995	Meeting of PPS Management council, trial team (except Felderhof) and members of the Appeal Branch to discuss the history of case, merits of an appeal, merits of retrial and the issue of hiring outside

counsel.

June 27, 1995	Trial team provides opinion that there remains a <i>prima facie</i> case and a reasonable likelihood of conviction.
June 28, 1995	Chief Crown Attorney (Appeals) recommends that the Attorney General make the decision whether to appeal or not.
July 4, 1995	Deputy Director of Public Prosecutions recommends to the Attorney General to appeal the decision of Justice Anderson. Notice of Appeal is filed setting forth eight grounds of appeal.
July 13, 1995	Nova Scotia Court of Appeal Chambers orders the hearing of the appeal for November 29, 30 and December 1, 1995.
July 19, 1995	PPS management council decides to engage outside counsel due to the issues surrounding the Crown's handling of the case. Craig Garson, Q.C., is appointed. Herman Felderhof and Peter Rosinski return to regular duties in New Glasgow with Rosinski assisting in the appeal on a part-time basis. Andrew Macdonald and G. Arthur Theuerkauf are assigned to assist Mr. Garson on the appeal.
July-October, 1995	Crown prepares for the appeal.
October 10, 1995	Jerry Pitzul assumes position as DPP.
November 29, 30 and December 1, 1995	Appeal is heard in Nova Scotia Court of Appeal. At the conclusion of the hearing, the Court rules there was no non-disclosure or late disclosure that affected the accused's right to full answer and defence. The Court also finds there was no abuse of process by the Crown and that the trial judge interfered with the prosecution and thereby created a reasonable apprehension of bias. The Court of Appeal orders a new trial.
December 1995	The second prosecution team is appointed: Marc C. Chisholm, Q.C., Robert McCarroll, Robert Hagell, Rob Fetterly, G. Arthur Theuerkauf and Andrew S. Macdonald.
December 30, 1995	Defence files Notice of Appeal with the Supreme Court of Canada.

November 26, 1996	Appeal hearing before the Supreme Court of Canada. Judgment is reserved.
March 20, 1997	The Supreme Court of Canada releases its decision. The Order of the Nova Scotia Court of Appeal for a new trial is upheld by a majority 7-2. The Court orders that the accused recover their reasonable legal costs of the proceedings to date and be paid reasonable legal fees for the new trial on the basis that the delays and the costs they had to bear arose from the systemic problems beyond their control which, to a large extent, were occasioned by the conduct of the trial judge. The dissenting Justices deliver an opinion that was highly critical of the Crown's conduct.
March 27, 1997	The Director of Public Prosecutions asks for a series of reports from the Prosecution Team on Trial Readiness, How to Approach a Defence Stay of Proceedings Motion, The Impact of the Supreme Court of Canada decision, Whether the Crown's disclosure Obligation Could Be Met, Whether It Was In The Public Interest To Proceed With The Case and The Reasonable Likelihood of Conviction. Phillips complains to the Nova Scotia Barristers' Society regarding abuse of process against 6 members of the Public Prosecution Service in connection with the first trial.
May 27, 1997	Report on Trial Readiness is provided to the DPP.
June 25, 1997	Report on the handling of anticipated defence pre-trial motions is provided to the DPP.
September 8, 1997	Reports on composition of the trial team and on disclosure are provided to the DPP.
October 29, 1997	Report by R. Hagell on Public Interest and Likelihood of Conviction is provided to the DPP.
December 1, 1997	Phillips' complaint to the Nova Scotia Barristers' Society against Crown Attorney Macdonald is dismissed.

January 1998	Prosecution team meets with selected expert witnesses to assist in assessing the strengths and weaknesses of its case, in particular, whether there is or is not a reasonable likelihood of conviction.
February 9, 1998	Interim report to the DPP from the prosecution team that there is a Reasonable Likelihood of Conviction.
February 16, 1998	Phillips' complaint to the Nova Scotia Barristers' Society against the remaining Crown Attorneys is dismissed.
March 24, 1998	Report on Public Interest to the DPP.
March 24 - June 18, 1998	Series of opinions from A. Liney.
June 19, 1998	Second prosecution team officially communicates to the Acting DPP its opinion that there is not a reasonable likelihood of conviction.
June 22, 1998	Summary of the legal and factual basis of the team's conclusion is provided to the Acting DPP.
June 24, 1998	Acting DPP sends materials to the Attorney General in preparation for a meeting scheduled later that day with the Acting DPP and Marc C. Chisholm.
June 30, 1998	A Stay of Proceedings is entered in Pictou Supreme Court and a letter is sent to the defence teams advising them of the Crown's decision and of its intention not to recommence proceedings.
July 17, 1998	The Honourable Fred Kaufman, C.M., Q.C., is appointed by the Attorney General to conduct a review of the performance of the PPS.
October 1998	Duncan R. Beveridge, Q.C. and Patrick J. Duncan, Q.C., are retained by the Honourable Mr. Kaufman to conduct a review of the PPS' handling of the Westray prosecution.
June 16, 1999	An interim report is prepared by Duncan Beveridge and Patrick Duncan and submitted to the Minister of Justice.

EXECUTIVE SUMMARY

On July 17, 1998, the Honourable Fred Kaufman, C.M., Q.C., was appointed by the Minister of Justice to conduct an independent review of the performance of the Public Prosecution Service (PPS). An aspect of this review included an examination of the PPS' handling of the Westray prosecution. Given the significant commitment of time and resources required to complete a review of the Westray prosecution, Duncan R. Beveridge, Q.C. and Patrick J. Duncan, Q.C. were retained by Mr. Kaufman to carry out this review under his supervision. It was agreed that their review could not be completed in time for inclusion in Mr. Kaufman's principal report, which was published in June 1999.

SECTION I - INTRODUCTION

The review of the Westray prosecution was broken down into three phases. The first was to determine the facts and legal principles involved in the Crown's decision to enter a Stay of Proceedings. The second would focus on the issue of why it took so long for the Crown to come to its conclusion that it did not have a reasonable chance of conviction at trial, and why did the first trial team not come to the same conclusion. The third phase would examine the problems that the prosecution service encountered in the first prosecution effort and assess the various criticisms made concerning the resourcing and conduct of the prosecution.

An interim report was submitted to Mr. Kaufman on June 16, 1999, which concluded that, keeping in mind the principles with respect to the exercise of discretion, there was no clear basis to interfere with the exercise of the discretion to enter a stay that was recommended by the prosecution team and accepted by the Deputy Director of Public Prosecutions and the then Attorney General in June 1998.

SECTION II - THEORETICAL FRAMEWORK

The original criminal charges brought against the accused were set out in an Information dated April 20, 1993. The charges were criminal negligence causing death and unlawful act manslaughter. The charges, as drafted in that Information, were quashed by Curran Prov. Ct. J. on July 20, 1993, on the basis that they did not contain sufficient detail. New charges were laid on July 23, 1993, containing particulars regarding the allegations of criminal negligence and unlawful act manslaughter. These charges were superseded in May 1994 by the preferment of a direct Indictment, which contained essentially the same allegations.

In a general way, the burden was on the Crown to prove beyond a reasonable doubt that the acts or omissions of the accused caused the deaths of any one of the 26 miners and that the accused showed a wanton or reckless disregard for the lives or safety of other persons.

To establish wanton or reckless disregard, mere civil negligence is not sufficient. The Crown must establish that the impugned conduct constitutes a marked and, some would say, substantial departure from conduct expected of a reasonably prudent person in the circumstances. Although not definitively decided, all sign posts indicate that the conduct is to be measured using an objective rather than a subjective standard.

To establish the offence of manslaughter the Crown must prove beyond a reasonable doubt that the accused caused the death of one or more of the miners; that the act causing the death was unlawful; that the commission of the unlawful act was intentional, and that it was foreseeable that the commission of the unlawful act would create a risk of bodily harm.

The unlawful act does not have to be criminal. It can be an offence established by federal or provincial statute if the prohibited conduct involves a dangerous act, is not an offence of absolute liability, and is not unconstitutional.

To establish causation, the impugned conduct need not be the only or even a substantial cause of death. The Crown need only prove that the acts or omissions of the accused contributed to the cause of death outside of the *de minimus* range (in layman's terms, that it was outside the inconsequential).

Power to Terminate

Discretion exists at every level of the administration of justice, from the police power to investigate, arrest, and charge, to the exercise of discretion by prosecutors at a myriad of junctures during the criminal process, and finally to that exercised by the judiciary.

While exercise of discretion by the judiciary follows the model of openness and public accountability, the exercise of discretion by the police and Crown is often virtually hidden from the public view. It has only been in relatively recent years that there has been any revelation to the public of how this power is exercised.

The discretionary power of the prosecution to terminate or abandon proceedings is recognized throughout the common law world. Although there are many formulations of how this discretion ought to be exercised, it is usually a decision that is divided. The first is a determination that there is sufficient evidence to proceed and the second is that the prosecution is in the public interest.

In Nova Scotia, the discretionary power of the Attorney General with respect to prosecutorial decisions is delegated to the office of the Director of Public Prosecutions. It is not an absolute delegation. The Attorney General retains the power to issue general instructions or guidelines with respect to all prosecutions, a class of prosecutions, or with respect to a particular prosecution.

The Public Prosecution Service is guided by a Directive by the Director of Public Prosecutions that requires a Crown Attorney to be of the opinion that there is a "reasonable chance" of conviction at trial and that the public interest is best served by a prosecution.

What is the appropriate threshold in theory, and how it should be applied in practice, has been the subject of numerous reports and studies. In essence, this type of assessment is a subjective one, but it is one that must be guided by objective factors. There exists in Nova Scotia an uncertainty as to the meaning of the test "reasonable chance of conviction," and hence how it should be applied to any particular case.

SECTION III - WORK OF THE SECOND PROSECUTION TEAM (1995-1998)

Background

The proceedings against Messrs. Phillips and Parry and Curragh Inc. first came to trial on February 6, 1995, before the Honourable Justice N.R. Anderson. The proceedings did not go smoothly. Justice Anderson called Mr. Herschorn, the then Acting Director of Public Prosecutions, and suggested that the lead prosecutor be removed. He indicated that if Mr. Herschorn did not act, he, the trial judge, would take the necessary steps himself. The Crown brought a recusal motion to have the judge step aside and declare a mistrial. The application was dismissed.

The defense brought an application to stay the proceedings. On June 9, 1995, Justice Anderson concluded that disclosure problems amounted to an infringement of the accuseds' rights under the *Charter*, and he entered a Stay of Proceedings and awarded costs. This order was appealed by the Crown. Given that the propriety of Crown conduct was in issue, the PPS retained outside counsel to prepare and argue the appeal. The PPS was of the opinion at that time that should a new trial be

ordered, they would have a reasonable likelihood of conviction.

In the fall of 1995, an assessment was carried out regarding the resourcing requirements to prosecute the case should a new trial be ordered. Jerry S.T Pitzul assumed the position of DPP in October 1995. He accepted the recommendation that a six-lawyer team be formed, with the appropriate support staff.

The appeal was heard on November 29, 30, and December 1, 1995. At the conclusion of the hearing, in an oral decision, the Court allowed the appeal and ordered a new trial. The court held that the trial judge exhibited an appearance of bias that incurably infected his decision on the Stay application and that the trial judge had failed to make an inquiry and proper determination as to the impact of the allegations of late or non-disclosure. Messrs. Phillips and Parry filed a Notice of Appeal with the Supreme Court of Canada in December 1995.

The second prosecution team was quickly assembled. It was anticipated by the team that the Crown would be ready for trial by late spring or early summer 1996. A comprehensive collection and cataloguing of all documents was undertaken but not completed until February 1998.

There was no lead counsel assigned to head the prosecution team. This created, along with inherent problems in handling a file with the legal and factual complexities of the Westray prosecution, inefficiencies that hampered the prosecution effort. New issues and questions arose during their work on the file. The witness list ballooned from approximately 200 witnesses to almost 300. Many of the problems that the team identified with aspects of the Crown's case could not be definitively answered. The concerns or issues included problems with the statements that had been taken, calibration of the measuring equipment used in the mine, the validity of post-explosion coal dust sampling, the admissibility of evidence seized pursuant to search warrants, whether the experts could reliably say there was a coal dust explosion and the need to engage an expert on whether or not the coal dust samples constituted representative samples.

The critical time period in the work of the second prosecution team was from March 1997 to March 30, 1998. It was on March 20, 1997, that the Supreme Court of Canada released its decision on the appeal by the accused from the Order of the Nova Scotia Court of Appeal directing a new trial. The Supreme Court of Canada, by a majority of 7 to 2, dismissed the appeals by the accused and upheld the order for a new trial. The majority concluded that the order of the trial judge staying the charges was void. The majority was careful to refrain from making any conclusions about the issues or facts. In an unusual move, the majority ordered that the costs of the appellants were to be paid by the province and that the reasonable legal costs to be incurred in the new trial should be also paid.

The award of costs was not directed against the PPS for any perceived misconduct, but arose out of what the Court called "systemic problems" which were beyond the control of the Appellants and were, to a large extent, occasioned by the words and actions of the trial judge.

Two Justices of the Supreme Court of Canada wrote a lengthy dissenting opinion. It was a scathing indictment of the Crown. They considered that the entire proceedings were tainted by prosecutors who were playing to an enraged public, and playing to win. They concluded that the conduct of Crown counsel at trial violated the fundamental principles that underlie the community's sense of fair play and decency and constituted an abuse of the court's process.

The Director of Public Prosecutions immediately requested from the Westray prosecution team reports on, amongst other things, trial readiness; could the Crown meet its disclosure obligation; was there a reasonable likelihood of conviction and was the prosecution in the public interest. Although there was no set time frame to provide these reports, it was anticipated that they would be done within weeks rather than months.

By the end of August 1997, the team reported orally to the DPP. An opinion was not offered by the team as to whether there was or was not a reasonable likelihood of conviction. Some individual members were not prepared to express an opinion on the basis that there was much more to do before an opinion could be expressed. Other members felt that there was a reasonable likelihood of conviction. All agreed there was more work to be done. One of the team members, Robert Hagell, asked to be reassigned from the Westray prosecution following submission of a detailed memorandum dated October 29, 1997, and a letter to the DPP, also dated October 29, 1997. Mr. Hagell argued that the team was not then, nor could it ever be, in a position to say that the Crown had a reasonable likelihood of conviction. Although Mr. Hagell legitimately highlighted many of the factual and legal complexities involved in the prosecution, it would have been unreasonable for the Crown to accept the reasons and rationale offered to discontinue the prosecution.

The Westray prosecution team did not accept Mr. Hagell's overall opinion. They were unanimously of the view that it was premature to conclude that the Crown did not have a reasonable likelihood of conviction or that it was otherwise not in the public interest to proceed. The DPP acceded to Mr. Hagell's request to be reassigned.

Mr. Hagell's memorandum of October 29, 1997, and his subsequent departure from the team, did not have a direct impact on the ultimate decision by the team to recommend discontinuance of the prosecution, but it did have a devastating impact on the morale of the team.

Reasonable Likelihood of Conviction

It had long been recognized that the outcome of the case was heavily dependent on expert opinion evidence. It is relatively rare that any two experts in a field will agree on every issue. The Westray prosecution team was always aware that there was some divergence of opinion amongst their experts.

Expert opinion evidence was necessary to deal with the issues of the standards of a reasonable mine manager and the intricacies of ventilation, coal dust and the safe operation of a mine. One of the difficulties that the Crown was aware of was the difference of opinion about the source of the methane layer that had been ignited, where the methane exploded and the location of the ensuing coal dust explosion. To try to resolve or understand the basis for the divergence of opinion, a meeting was arranged for January 1998 of 3 of their experts: Messrs. Liney, McPherson, and Muirhead. At this meeting the areas of disagreement were resolved except for the issues of what actually ignited the methane layer and the source of the methane. Detailed questions/issues for discussion were circulated. The responses of all three experts were confirmatory that there had been a methane-initiated coal dust explosion attributable to failures to meet legislative or ordinary mining standards in ventilation and/or handling of coal dust.

On February 9, 1998, the second prosecution team wrote to the DPP that there was a reasonable likelihood of conviction on both the criminal negligence and manslaughter charges should they proceed to trial. The language used was cautious. There was further work to be done.

Report on Public Interest

The team prepared a detailed report on the issue of public interest. This report was dated March 24, 1998. It reaffirmed the team's opinion that there was a reasonable likelihood of conviction. The team sought direction on whether or not to impose a higher sufficiency of evidence standard and whether or not it was in the public interest to proceed to trial. These issues were to be discussed at a Management Committee meeting on March 26, 1998.

However, on March 19, 1998, Mr. Chisholm had sent a facsimile transmission to Dr. McPherson, Prof. Muirhead, and Mr. Liney, asking if it was a reasonable possibility that a coal dust explosion had not occurred. Dr. McPherson and Prof. Muirhead responded in strong definitive language that it was not a reasonable possibility.

Mr. Liney responded in a letter dated March 24, 1998, that if the prosecution could not prove that the continuous miner was the source of ignition, then they would have little chance with any of the other matters. In relation to coal dust, he opined that he did not believe that the Crown could prove beyond a reasonable doubt that the coal dust was involved, although he believed that coal dust was clearly implicated on a balance of probabilities. His view was that the evidence implicating coal dust was entirely circumstantial and anecdotal.

The Management Committee meeting of March 26, 1998, was taken up discussing the implications of Mr. Liney's letter. No firm decision was reached to terminate the prosecution. It was decided that the team would arrive at a position and communicate it to the Deputy Director of Public Prosecutions (Mr. Pitzul being slated to leave the position of DPP on April 1, 1998), and that the Deputy DPP would then liaise with the Attorney General. In a team meeting on March 30, 1998, the majority felt there was not a reasonable chance of conviction, but they wanted to be sure that they properly understood what Mr. Liney had written. It was decided to follow up with Mr. Liney while at the same time a draft letter would be prepared to the Deputy DPP setting out reasons for discontinuance of the prosecution.

SECTION IV - DECISION ON TERMINATION

The team brought Mr. Liney to Halifax to ensure not only a sound understanding of his opinion, but also that there was no additional information available which might alter it. Mr. Liney reviewed 68 binders of ventilation information that the team had assembled. He did not change his opinion. If anything, the review created further concern for both the ventilation and coal dust aspects of the Crown's case. Mr. Liney followed up those meetings with letters of May 21 and May 25, 1998. The content of the letter of May 25, 1998, was central to the Crown's conclusion that they did not have a reasonable likelihood of conviction at trial. That letter set out Mr. Liney's opinion that the pre and post-explosion dust samples had no evidentiary value, that the quantity of stone dust purchased by Curragh Inc. was not significant, assuming the highest ash and moisture levels in the mine and due to his recent readings showing the floors of the main slopes to have been covered with road gravel. His analysis was a piecemeal examination of the evidence available to the Crown.

The prosecution team consulted with Dr. McPherson and Prof. Muirhead who provided opinions that did not agree with the logic of, or the significance of, the propositions advanced by Mr. Liney. This left the prosecution team in a difficult position.

Recommendation to Terminate

While not necessarily agreeing with all of the opinions offered by Mr. Liney, the members of the second prosecution team were not prepared to discount them nor to drop Mr. Liney as a Crown witness. To do so would be to provide cogent evidence at the anticipated stay of proceedings motion at trial that the Crown was still "playing to win."

The team came to the conclusion that a reasonable doubt would exist in light of the anticipated evidence from Mr. Liney.

The second prosecution team communicated their opinion to the Acting Director of Public Prosecutions on June 19, 1998. A further letter, dated June 22, 1998, set out a brief summary of the legal and factual basis for the team's recommendation. The basis for each of the propositions that the Crown relied on in providing its summary of reasons is attributable to the opinions of Andy Liney.

There are errors in the letter of June 22, 1998, regarding the burden on the Crown, but we are satisfied that the team was aware of the appropriate standard and that any misstatements should be viewed as harmless error - in other words, it would not have affected the opinion of the members of the team.

There were many factual and legal issues involved in the prosecution. Some of them could not be resolved. It was neither the legal uncertainties nor the factual ones that lead the Crown to its ultimate decision to recommend termination of the prosecution. But for the opinions of Andy Liney, the Crown would have remained of the view that there was indeed a reasonable likelihood of conviction had the charges proceeded to trial. If Mr. Liney was called as a witness, and was qualified as an expert witness beyond being a ventilation specialist, the Crown's assessment that this evidence would create a reasonable doubt was not an unreasonable conclusion.

Relationship with the Attorney General

On June 24, 1998, the Acting Deputy Director of Public Prosecutions wrote to the Attorney General and Minister of Justice, attaching the letters dated June 19 and 22, 1998. An opportunity was requested to meet with the Attorney General to discuss the decision to terminate the prosecution. The Attorney General did not seek to question the recommendation of the Westray prosecution team, nor the intended exercise of discretion by the Deputy Director of Public

Prosecutions to terminate the prosecution by the entry of a stay of proceedings. The position of the Attorney General was that he was prepared to rely on the Crown Attorneys' professional judgment. He had neither the expertise, theoretical framework nor information to question the judgment being presented to him. He indicated, in essence, that he would not intervene in the prosecution.

The letter of June 22, 1998, was an inadequate basis for the then Attorney General, or any Attorney General, to knowledgeably and independently exercise his or her common law or statutory powers. The team anticipated that a report would be prepared by them setting out their work since 1995 and providing detailed reasons for their conclusions. This anticipated report was pre-empted by the announcement by the Attorney General of Mr. Kaufman's appointment.

Since the Attorney General is the chief law enforcement officer in the Province of Nova Scotia and is accountable to the public in the legislature for the Public Prosecution Service, it would have been far better for the administration of justice had detailed reasons been provided to him before the proposed entry of the stay of proceedings. The ultimate result may well have been the same, but it would have allowed the Attorney General the opportunity to be properly informed about the largest, and many would say, most significant criminal prosecution in the history of Nova Scotia. A failure to properly inform the Attorney General can render illusory his or her role as the chief law enforcement officer.

It was up to the Attorney General, should he wish it, to request detailed reasons and to informally, or formally if necessary, delay the entry of the stay of proceedings pending receipt of those reasons. However, there is no basis to suggest that any member of the Public Prosecution Service or the Attorney General was not acting in good faith in the preparation of the summary of reasons dated June 22, 1998, and the reliance placed on that letter.

SECTION V. SUBSTANCE OF THE DECISION

We had concerns about the correctness of the opinions offered by Mr. Liney in March - June, 1998. We identified a number of inconsistencies and contradiction by other experts. We were encouraged by some members of the Westray prosecution team to meet with Mr. Liney so that we could assess first hand his opinions and the basis for them.

It was decided that if, indeed, we could be satisfied that Mr. Liney's opinions were correct, this could provide assurances to the public about the decision to terminate the prosecution.

Mr. Liney was originally retained by the first prosecution team in January 1994 as a ventilation expert. His role expanded into one of being a consultant who provided feedback and input about other experts, witnesses, and trial testimony during the first trial. If anything, this reliance increased after the work of the second prosecution team commenced in January 1996.

Mr. Liney has a degree in engineering, is qualified as a mine manager and has extensive experience in coal mining. He eventually became a specialist in ventilation and held high office with British Coal with responsibility for ventilation. In December 1992 he left British Coal and became a self-employed ventilation consultant. Mr. Liney was forthright in acknowledging that he is not a coal dust expert, but he does have a broad knowledge base about the dangers of coal dust, the need to have regular sampling programs and the mechanisms available to prevent and control a coal dust explosion. We reviewed with Mr. Liney the opinions he had offered to the Crown regarding the placement of gravel on roadways and how that would hinder the Crown in proving that there was an excessive accumulation of coal dust. The only documentation that he relied on was a paper produced by Curragh Inc. that was to be introduced during the first trial that sets out explanations offered by the company on efforts it claims it took to control coal dust in the mine. One of those claims was that it had placed 2" to 4" of road gravel on the running surface in the mains. Mr. Liney indicated that he felt that the issue of gravel dust had been overplayed, and that he had identified it as something that should be investigated. Subsequent queries by the RCMP showed that very little gravel had been placed in the #1 mains, and then only from the surface to #5 cross-cut. There is no evidence in the ventilation binders that could reasonably be viewed as providing a reliable basis to say there was extensive placement of gravel on the roadways.

Although many members of the second Westray prosecution team felt that Mr. Liney had changed the substance and/or tenor of his opinions, Mr. Liney bristled at this suggestion. After reviewing many statements made by Mr. Liney in his testimony to the Westray Commission of Inquiry and in written materials to the Westray prosecution team, it would be unreasonable to conclude anything other than that he had indeed changed many of his opinions, in particular, whether or not there had been a coal dust explosion and in relation to the quality of the seals used by the Westray management to seal off the south west 1 panel.

Mr. Liney gave his opinion in March 1998 that the pre and post-explosion samples were of little value. In May 1998, he provided the opinion they were of no value. The Crown had available to it a number of sources of evidence that the coal dust in the Westray mine exceeded the statutory limits and that this coal dust exploded, causing the deaths of the miners in the north mains. The second Westray prosecution team harboured doubts about whether or not the post-explosion samples would be considered representative of the mine dust in the mine. There were discussions by the

team about the advisability of obtaining an expert to deal with the issue. Some attempts were made to contact an expert, but they were unsuccessful.

We retained Jan Merks of Matrix Consulting Inc. Mr. Merks is a specialist in metrology, the science of measurement, and is competent to provide opinions on the issues of sampling, sample preparation, and analysis. All available information with respect to location, procedure and handling of the samples and analysis was sent to Mr. Merks. He provided his opinion that the probability that the dust in the mine did not meet the minimum incombustibility level of 65% is so high that it approaches certainty. He concluded: "The test results allowed rigorous statistical inferences which confirm that the percentage combustible matter in the underground workings of the Westray mine did exceed the maximum allowable limit of 35%."

It must be stressed that it should not be concluded from our review that it is our opinion that the Crown should have proceeded to trial. We have not examined all the statements of witnesses and documentary evidence, nor conducted any interviews with the hundreds of witnesses the Crown would have needed to rely on at trial. In addition, our comments and opinions should not be taken as indicating that one, both, or all three accused are in any way guilty of the offences with which they were charged. To even tentatively hold that view would be not only an affront to the presumption of innocence, but would also give no credence to the fundamental roles that would be played in a trial process, such as cross-examination by skilled and well-prepared attorneys, rulings on the admissibility of evidence, and the opportunity of the defence to adduce evidence of both expert and non-expert witnesses. What this aspect of our review does demonstrate is that there are well respected people in the industry who could have shed light on one of the key issues, the validity of post-explosion sampling. There are also experts in the field of methane explosions that could have been engaged to assist the Crown.

There is no one reason why the Crown did not seek input from other experts to resolve some of the troubling issues. It was caused by a variety of factors. Included are the following:

- The monumental undertaking by the Westray prosecution team to locate, review, catalogue, and reproduce documentary materials.
- By design, there was no lead counsel. There was, therefore, considerable duplication of work, as well as a lack of focus as individuals identified problems and issues and pursued those at the expense of completing the assigned tasks.

- The team had come to rely heavily on the opinions of Andy Liney. They considered him to be knowledgeable and reliable.
- The inherent complexities associated with three concurrent investigations involving an alleged crime scene, where the security of the scene was not protected and where there was not the normal extensive forensic examination of a mine explosion.
- The case presented more than the usual demands with respect to the legal issues that faced the Crown.

SECTION VI - WHY DID IT TAKE SO LONG FOR THE CROWN TO REALIZE THAT IT DID NOT HAVE A REASONABLE CHANCE OF CONVICTION

The first time there was an assessment of the strength of the Crown's case was at the time of the preferment of the direct Indictment in May 1994. At that time, the Crown felt sure that they had not just a reasonable chance of conviction, but a very good one. Lead counsel at that time, Mr. Felderhof, was of the opinion that there was an 80% likelihood of conviction.

The issue of likelihood of conviction was revisited in June 1995 during the deliberation about whether or not to appeal the judicial stay of proceedings entered by Justice Anderson. Although the Crown's confidence was clearly shaken by the developments during the trial, particularly the inability to deal with the documentary aspect of the case, members of the first prosecution team still believed there was a reasonable chance of conviction.

The issue was not revisited until March 1997, when the then DPP, Jerry Pitzul, asked for a report from the team on the issue. In two written reports, February 9, 1998, and in the Public Interest Report, March 24, 1998, the team were of the view that it did have a reasonable chance of conviction. It was the opinions of Mr. Liney, commencing March 24, 1998, and concluding June 18, 1998, that caused the team to alter this view. If it had not been for Mr. Liney's opinions, they would have been able to proceed to trial. There was, therefore, no undue delay.

Resourcing

Although some would argue that additional resources would have assisted the Crown, in our opinion, the necessary resources for the PPS to bring this prosecution back to trial were available. However, we do have some reservations about the efficiency of the utilization of resources that were available. The issue of resourcing was not an impediment to either the Public Prosecution Service retrying these charges, or in arriving at an earlier conclusion that, in the opinion of the remaining members of the prosecution team, there was not a reasonable chance of conviction at trial.

SECTION VII - REVIEW OF THE PROSECUTION EFFORT (1992-1995)

On May 9, 1992, a massive explosion traveled through the entire Westray mine killing all 26 persons working underground. A rescue attempt was carried out under the direction of Curragh Inc., with Gerald Phillips acting as the company's rescue coordinator. This attempt was officially abandoned on May 14, 1992.

On May 15, 1992, the provincial government appointed Justice K. Peter Richard of the Nova Scotia Supreme Court to conduct an inquiry into the establishment and operation of Westray mine.

The Department of Labour took steps to initiate an investigation shortly thereafter. The last agency to join the investigation was the RCMP, who appointed S/Sgt. Ches MacDonald on May 21, 1992, to head a team of 13 members. Throughout the criminal investigation and prosecution, a lingering question was left as to the appropriateness of the Department of Labour investigating alleged breaches of regulations that it was supposed to ensure compliance with.

Concurrent investigations by the Department of Labour, the Commission of Inquiry, and the RCMP created problems. Witnesses were interviewed and re-interviewed by multiple investigators, sometimes in the presence of others, and often with leading questions on important issues. The concurrent investigations also became problematic as various orders for the seizing and copying of documents were implemented by the Department of Labour and by the Commission of Inquiry. Initial plans by the RCMP to carry out searches in government offices were changed because of the order issued by the Commission of Inquiry for all government departments to forthwith deliver all documents and records to the Inquiry. The RCMP assumed that all relevant documents would thus end up in the hands of the Inquiry where they could be retrieved under search warrant at a later time. This was not a good investigative decision.

The company proposed to flood the north mains. The RCMP did not retain their own expert until June 17, 1992. The flooding commenced on or about June 23, 1992. Regrettably, this action resulted in the north mains being forever lost for the purposes of forensic investigation. The RCMP investigation team sought the assistance of a full-time Crown Attorney. The management at both the PPS and the RCMP felt that there should be a limited role for the PPS. It would be a number of months before Crown Attorneys were assigned to provide advice to the RCMP.

The Department of Labour (DOL) also sought pre-charge advice, delivering an investigative brief by August 24, 1992. This brief eventually lead to the laying of 52 charges under the *Occupational Health and Safety Act* and the *Coal Mines Regulation Act*. Two Crown Attorneys, Christopher Morris and Stephanie Cleary were initially assigned to provide advice to both investigations. Advice was also provided by the DPP, John Pearson.

Mr. Morris and Ms. Cleary raised issues about two potential conflicts of interest. The first was that a regulatory agency was investigating alleged failures by an employer or others to comply with the very laws that the agency is supposed to ensure compliance with. The second was the concern about the perception that could be created by the PPS providing legal advice to the same personnel in the DOL that *may* come to be viewed by the RCMP as suspects in its criminal investigation: that is, the RCMP could end up seeking legal advice from the PPS on issues surrounding a charging decision on the same personnel that the PPS was providing advice to in relation to the DOL investigation.

The DPP has no power to direct an investigation. But he raised the concern, and recommended that any personnel involved in regulatory responsibilities have no involvement in the investigation of suspected violations. All issues surrounding conflicts of interest could have been avoided by the entire investigation being conducted by the RCMP.

The DPP retained control over the provincial offences and assigned Mr. Morris and Ms. Cleary to provide advice to the RCMP. Mr. Pearson warned as early as September 1992, that he would actively consider termination of any provincial prosecutions to avoid prejudicing criminal charges that may be laid by the RCMP. It was his opinion that, from a strict legal point of view, issues of double jeopardy would not preclude both prosecutions from proceeding, but there was a risk that the case could become a "test case" and that subjecting the same defendants to two complex and lengthy proceedings might be considered an abuse of process. Mr. Morris and Ms. Cleary identified a host of outstanding issues and problems. Many of these same issues continued to plague the prosecution during the first and the second efforts of the prosecution.

On December 10, 1992, Mr. Pearson's attempts to adjourn the taking of pleas on the provincial offences was unsuccessful. He stayed 34 of the provincial charges. The remainder were stayed on April 19, 1993.

Resourcing

From the outset, Mr. Morris and Ms. Cleary indicated the need for adequate office space, a secretary, and computers. By December 1992, they identified the need for a third Crown Attorney. The perceived lack of responsiveness to their resourcing needs lead to their request on February 22, 1993, to be relieved of responsibility for the file. The PPS management had, commencing August 24, 1992, made numerous requests for resourcing. These requests were either refused by the Management Board or "stood," that is, deferred to a later date. The requests were reasonable. The DPP at the time, John Pearson, sent clear warnings that unless the government provided the Public Prosecution Service with the modest resources they had requested, he feared the Public Prosecution Service would be unable to satisfy its statutory mandate in handling the prosecutions arising out of the Westray explosion.

When Mr. Morris and Ms. Cleary resigned from the file, they set out what they believed to be the minimum resource requirements for the PPS to handle the pending criminal prosecution as: four Crown Attorneys, one of whom would be an experienced commercial crime file manager, support staff, including a paralegal/librarian, computer equipment and appropriate physical resources including office equipment and space. Mr. Pearson accepted these recommendations and passed them on to the government along with a request for a different resourcing mechanism for handling this kind of major undertaking. Shortly afterwards, the government approved the resourcing requests. There was a significant lack of understanding of the PPS, its role and its needs by the individuals who considered the requests. It appears that, confronted with many demands from different quarters for a limited supply of money, the PPS request was viewed as simply another government department with its hand out.

Despite the deplorable inattention paid to the PPS funding needs for Westray in 1992 and early 1993, there is little to suggest that it had a direct impact on the future handling of the case. That is not to say that the problems of the resourcing did not have an impact. Without a prosecution team in place with adequate resources, the PPS lost the opportunity to be familiar with the file and implement procedures and protocol to try to avoid problems that later plagued the prosecution. The lack of initial resourcing also hampered the PPS attempts to recruit the prosecution team.

A prosecution team was selected, but split between offices in Halifax and New Glasgow. One of the first issues raised by the team was that of ensuring that disclosure was uniform to all accused. The RCMP indicated that their computer system satisfied that concern.

By early December 1993, a preliminary inquiry date of March 28, 1994, was set, but Mr. Parry did not have counsel for the preliminary inquiry. Applications were made in Supreme Court by Mr. Parry to compel Legal Aid to provide counsel. This resulted in an adjournment of the preliminary inquiry. Mr. Phillips gave formal notice of his intention to waive the preliminary inquiry and to re-elect trial by judge alone.

The prosecution team then considered seeking the consent of the DPP to prefer a direct Indictment. Mr. Pearson was prepared to provide his consent on being assured that there was a reasonable likelihood of conviction and that disclosure would be complete. The direct Indictment was preferred on May 18, 1994, and the date of first appearance in Supreme Court was June 16, 1994.

The defence team sought information about the Crown's case, in particular, their witness list, the order that they would be called, and the exhibits that each witness would be referred to. The first prosecution team did not agree that this kind of information needed to be provided and suggested that these kinds of concerns should be dealt with by the trial judge and not on a case management approach. Pretrial conferences were held throughout the fall of 1994. On January 18, 1995, the defence team for Mr. Phillips requested access to materials in the Department of Labour. The PPS responded that these materials were not in their possession, but took steps to assist the defence in getting access to the materials.

In one of several pre-trial motions, the defence team for Mr. Phillips argued against the admissibility of evidence of acts or omissions from September 1991 to May 1992, on the basis it would constitute "similar fact" or "bad character" evidence. The Crown then provided to the defence copies of what were known as the Cardinal River Coal materials. These materials had been received from the Alberta Department of Labour in 1993. The PPS had reviewed the materials and considered them neither admissible nor relevant. The defence team for Mr. Phillips used the late disclosure of the Cardinal River Coal materials as an example of how the Crown was assuring them that full and complete disclosure had been made, yet it had these materials in its possession since the summer of 1993. For the most part, the Cardinal River Coal materials were of marginal relevance. In addition, unbeknownst to the Crown at the time, they had, in fact, disclosed the bulk of the information contained in these files. Computer disks had been forwarded to each defendant on October 20, 1994. Included was a file prepared by the RCMP that summarized the information in the Cardinal River Coal files.

The Cardinal River Coal materials were significant for a number of reasons. They demonstrated to the trial judge that the defence complaints about lack of disclosure appeared to have merit. As it turns out, it also provides cogent evidence that the prosecution team did not have a good handle on the content of the materials it had.

SECTION VIII - ALLEGATIONS OF MISCONDUCT

The allegations of misconduct made against the Crown centred on disclosure. The defence complained that there had been non-disclosure, late disclosure and unreliable disclosure. A stay application was brought on the basis that the Crown's failure to fulfill its disclosure obligation had caused prejudice to the conduct of the defence and that no remedy other than a judicial stay of proceedings could cure the prejudice suffered. The defence also referred to the Crown's attitude of always insisting that they had made full and complete disclosure, and its uncooperative approach, seeming unwillingness or reluctance to provide basic information about witnesses and exhibits.

Intentional Non-Disclosure

We have examined all the materials before Justice Anderson on the stay application, both documentary and *viva voce*, and all written and oral submissions made before Justice Anderson, the Nova Scotia Court of Appeal and the Supreme Court of Canada. In our opinion, there is absolutely no evidence of any intentional non-disclosure.

Furthermore, there was no allegation of intentional non-disclosure before Justice Anderson, the Nova Scotia Court of Appeal and the Supreme court of Canada. The defence alleged that the Crown did not do their job, but did not suggest malice.

The defence complained before and during trial of:

- The seeming reluctance by the Crown to provide information about the witness list, the order of witnesses and the exhibits.
- The disclosure on February 1, 1995, of the Cardinal River Coal materials.
- The use by the Crown of documents that were edited copies of the original.

- The leading of evidence on direct examination involving the shredding of documents immediately after the explosion on May 9, 1992, and the non-disclosure of the RCMP investigation into the shredding allegation.
- The delegation of the initial disclosure assessment to the RCMP.
- The failure by the Crown to secure all materials from government departments, in particular the Department of Labour, that were relevant to the issues in the criminal case.
- The failure of the Crown to adequately respond to the initial order for particulars and the subsequent failure of the Crown to provide the particulars as directed by the supplementary order of the trial judge with respect to the allegation of the unsafe use of equipment.

Although it is dangerous to overgeneralize, we are confident in concluding that systemic under-resourcing of the investigation and prosecution is at the core of the problems that occurred which resulted in the charges not ending up in a trial on their merits. (This is to be distinguished from the 1992 - March 1993 resourcing issues noted earlier).

The software program that the RCMP used to catalogue their documents and information was considered, at the time of its selection, to be the best available. However, many of the problems that occurred with the software program were caused by inconsistent data entry. Either trained personnel should have been hired to do the work or a core number of RCMP civilian employees or members should have been trained and utilized in the process.

In addition, although the RCMP had numerous members assisting in the investigation up to the time of laying of the first Information, their manpower got quickly pared down to essentially one person, S/Sgt. Ches MacDonald. The file was too complex and voluminous for that. Although members of the first prosecution team spoke in laudatory terms of the dedication and energy demonstrated by S/Sgt. MacDonald, he was left without adequate time to ensure that relevant correspondence and other materials were properly filed, cataloged, and disclosed.

The prosecution effort by the PPS was also under-resourced and this was a major factor in the difficulties incurred before and during the trial before Justice Anderson. The fact that woefully inadequate resources had been allotted to the prosecutors responsible for the file from September

1992 to March 1993, created difficulties for the PPS management in recruiting Crown Attorneys willing to take on this huge responsibility. While Messrs. Felderhof, Rosinski, and Theuerkauf deserve recognition for even accepting to take on this task, they would be the first to recognize that their previous training and experience did not give them the necessary organizational and other skills for the handling of the file.

The first prosecution team made the decision to rely on the initial determination of relevance by the RCMP. Given the resources at hand, it was a reasonable and necessary reliance. However, in our opinion, the Crown was not adequately prepared to conduct the trial. The major reason for this was the lack of proper resources. There was no adequate filing system. There was no adequate system to demonstrate the content of disclosure that had been made to the defence. With more resources the Crown would have had the necessary manpower to resolve many of the disclosure issues that plagued them during the trial.

Although we identified the systematic under-resourcing of the investigation and prosecution efforts as the major contributor to the failure of the trial proceeding to a conclusion on its merits, we emphasize that this was not the only problem. Nor should it be taken as a conclusion that the failure of the Crown to disclose relevant information was fatal to the trial proceeding to a conclusion on its merits.

It is a rare trial during which some additional information is discovered, which ought to have been disclosed but was not. Counsel is faced with making a decision about the significance of the information. Sometimes this late discovery and lack of disclosure can be cured by a brief recess. Other times, an adjournment must be sought. If the prejudice is significant enough, a request for the judge to declare a mistrial may be made or an order for exclusion is sought. Costs may also be awarded. A judicial stay of proceedings may be granted as an appropriate and just remedy where it is not possible through other means to remedy the prejudice to the accused's right to make full answer and defence. It is to be utilized as a last resort and only in the clearest of cases.

There is no such thing as a constitutional right to disclosure. The Crown has an obligation to disclose and the accused has a right to receive full disclosure to ensure a fair trial and to make full answer and defence. Failure by the Crown to disclose does not amount to a violation of a right under the *Charter*. In order to establish a violation of a *Charter* right, the trial judge is required to make a determination as to whether or not the information that was not disclosed was *material*. A document may not have been disclosed. It may contain relevant information, but the non-disclosure may not be material because the information may already have been disclosed in some other fashion. It is therefore axiomatic that a trial judge must make an inquiry into not just whether the

information is relevant, but also whether it is or is not material.

In Justice Anderson's decision to stay the proceedings, he made the key findings that the PPS was in "possession" of all the relevant material that may be located at the Westray Commission of Inquiry, the Department of Labour, and other government departments; that the Crown seemed unaware of the evidence it had at hand or available to it to substantiate the charges; that there was a particular attitude on behalf of the Crown; that there was a lack of disclosure or non-disclosure and late disclosure that amounted to an infringement of the accused's rights to make full answer and defence. To arrive at this last conclusion, the trial judge referred to 7 examples.

During the hearing of the stay application before Justice Anderson, the Crown attempted to demonstrate that some of the information contained in the documents relied upon by the defence as examples of non-disclosure, was not material - in that the information contained in the documents was known to the accused through other means. Justice Anderson accepted the argument of the defence that it was not his function to examine the documentation of things that had been disclosed to determine whether or not the non-disclosure was, in fact, material.

An examination of the proceedings before the Nova Scotia Court of Appeal demonstrates an exhaustive review by the parties and the court of the allegations of late and non-disclosure. The hearing before the court lasted some 15 hours stretching over 3 days. The main argument on the appeal was that the stay of proceedings could not stand as the trial judge ought to have declared a mistrial because his actions had given rise to a reasonable apprehension of bias, if not actual bias. In addition, the Crown presented a detailed argument that focused on the lack of proper inquiry by the trial judge, and that the so-called non or late disclosure was not material.

In our opinion, the Crown was correct in the analysis it presented to the Nova Scotia Court of Appeal, that the information said to have been disclosed late was not material and that the trial judge had clearly misapprehended the evidence.

During the oral hearing of the appeal, the members of the panel of the Court of Appeal challenged either defence team to demonstrate anything that they were not provided with that prejudiced them. Counsel were invited to not just deal with the examples mentioned by the trial judge, but also any others that they may care to mention. They were unable to articulate any prejudice other than the waste of preparation time.

Given the material before the court, it was not surprising that the court was able to return later in the day on December 1, 1995, and deliver an oral decision.

Comments by the Supreme Court of Canada

The majority judgment, written by LaForest and Cory JJ., made no adverse comment about the conduct of the PPS. They specifically mentioned that they had carefully considered the facts, but would refrain from commenting on them so that the judge presiding at the new trial would not be in any way inhibited in dealing with any of the issues that may arise.

A dissenting opinion was written by McLachlin and Major JJ. It started with the premise that the history of the proceedings created the impression of a prosecution seemingly prepared to obtain a conviction at all costs. With all due respect, there are several serious errors in the facts relied upon in the dissent. We have examined all the material relevant to the conduct of the trial. We could find no evidence that the Crown bent and broke rules or attempted to cover up when it was caught, or that the prosecutors were playing to an enraged public and playing to win.

That is not to say that we endorse as proper how the PPS approached this trial and how it was conducted. The PPS did not commit the necessary resources to the proper presentation of the evidence available to them. This lack of resources, in terms of manpower and experience, precluded the Crown from taking the appropriate steps to ensure that it had reviewed the documentation and had the appropriate documents to be entered at trial. The first prosecution team knew that it was "thin," yet lost the most computer literate member of the team (Andrew Macdonald) for almost 6 months at the crucial time leading up to preparation for trial. The first prosecution team did not request additional resources. They took the philosophical approach that they had to deal with the hand that had been dealt them and do the best with what they had. Furthermore, generally accepted principles of trial preparation were not followed.

In our opinion, the evidence available to the first prosecution team made the case against Messrs. Phillips and Parry a prosecutable one and the trial should have been able to be completed on its merits. However, it is easy to see why the defence teams and Justice Anderson were frustrated by the Crown's seeming inability to track down the appropriate documents.

SECTION IX - SUMMARY

The Westray disaster required a demanding investigation and an exacting prosecution effort. As F.V. Tideswell articulately wrote:

An explosion is the nearly perfect criminal; it never confesses, seldom spares an eyewitness, and destroys most of the circumstantial evidence it might otherwise leave.

With the emphasis on safety in coal mines, for a mining disaster to occur, many things have to go wrong at the same time. It is the convergence of a number of failures.

In a similar fashion, there is no one reason that can be said to have caused the failure of this prosecution to arrive at a verdict on the merits. Like the explosion that triggered the investigation and prosecution, the failure was caused by the convergence of numerous factors. In our opinion, some of the difficulties were unavoidable. The best example is the fact that the dangerous conditions of the mine and the inaccessibility of the north mains made an extensive forensic examination difficult if not impossible.

However ill advised or short-sighted (or even if deliberately mischievous, which there is no evidence to suggest), the inadequate resourcing of the prosecution effort up to March 1993, did not bring about the ultimate result. It had a role to play, but a more subtle one. The PPS suffers from a systemic problem in having few staff members with the experience or training to handle a prosecution such as Westray. This stems from the PPS's hiring system and lack of training. Staffing tends to be maintained at the level that current case loads demand. There is rarely extra personnel available to meet extraordinary demands. The more senior litigators of the service have moved into management positions, and to the extent they are able to take on casework, are stretched too thinly.

There is nothing inappropriate in having the police carry out an initial determination of relevance for purposes of disclosure. It is a process that occurs in all Canadian jurisdictions. In essence, the Crown Attorney is entitled to assume that the police have provided all relevant information unless there is some reason to question that assumption. However, there are potential problems with this practice.

Recommendations were developed in 1997 that would require the police to provide a copy of the entire police file and a detailed inventory of it to the Crown. At a minimum, these recommendations are worthy of implementation, at least for all non-routine files.

In addition, there is no Directive from the Nova Scotia Department of Justice to police forces within the province ensuring appropriate training to comply with the Crown's disclosure obligations. The

importance of the police role in the Crown's ability to fulfill disclosure obligations is often overlooked. It should not be left to chance but ought to be dictated by the implementation of standard operating procedures made mandatory by the Attorney General.

There was no one reason that could be said to have caused the failure of this prosecution to arrive at a verdict on the merits. Amongst the more significant ones are the following:

- The failure to treat the mine as a crime scene and to take the necessary steps to carry out a complete and thorough forensic examination.
- The impact of other investigations.
- The appalling lack of resources provided to the PPS with respect to Westray from 1992 to March 1993.
- The premature laying of charges.
- The systemic deficiencies in securing, cataloguing, and producing relevant documents.
- The lack of adequate resourcing of the first prosecution effort which lead to the failure by the Public Prosecution Service to be properly prepared for trial, including the implementation of systems to ensure disclosure was not going to impede the trial process.
- Failure of the defence team for Mr. Phillips to bring to the attention of the trial judge at the earliest opportunity their allegations that there were materials in the government departments that had not been disclosed.
- The failure of the trial judge to conduct a proper inquiry with respect to the materiality of the late disclosure.

For the second prosecution effort, resourcing was not an issue. However, the case that they inherited was marred by the first prosecution effort. Great lengths were gone to to ensure all relevant documents were properly catalogued and disclosed. The second prosecution effort suffered by the decision to run a case as legally and factually complex as Westray by consensus. It

made the effort unwieldy and, at times, inefficient.

The second prosecution effort was further hurt by the scathing indictment of the Crown by the two dissenting Justices of the Supreme Court of Canada in March of 1997.

The second prosecution team concluded as late as March 24, 1998, that they did have a reasonable likelihood of conviction at trial. This view changed when they received Mr. Liney's letter of March 24, 1998. Even though other experts did not support the opinions of Mr. Liney, the remaining team members were not prepared to drop Mr. Liney as a Crown witness. It was entirely the opinions of Mr. Liney, given in the overall context of the case, that lead the Crown to conclude that they did not have a reasonable chance of conviction should the Westray prosecution proceed to trial.

Even though our conclusions and comments indicate that the first and second prosecution efforts could have and, in some instances, perhaps should have been handled differently, they should not be taken as a general indictment of the PPS or many of its lawyers who work long hours on difficult matters.

It is easy to find many instances of Royal Commissions, Inquiries, and external reviews that have examined the decisions and conduct by Crown officials throughout the common law world. It is because such important decisions are necessarily made out of the public view that concerns that are raised about the basis for such decisions can only be answered by the extraordinary step of an external examination.

It is the willingness of the chief law enforcement officer of any jurisdiction, and those who act pursuant to his power, to carry out such examinations, that help provide appropriate assurances that the government will commit the necessary resourcing for the important work that a prosecution service is entrusted to carry out, and to be vigilant in insisting that those that actually exercise prosecutorial discretion follow appropriate principles.

INTRODUCTION

On July 17, 1998, the Minister of Justice appointed The Honourable Fred Kaufman, C.M., Q.C., to undertake an independent review of the performance of the Public Prosecution Service (PPS). The Terms of Reference for the review asked for recommendations to achieve appropriate means and mechanisms for accountability, independence, efficiency of operation, and communication. Mr. Kaufman was asked to consider prosecutorial independence and public accountability and to examine the business elements of the Service with respect to its resources, processes, structure, and management.

Not only would the practices of the PPS be examined in general, but also with specific regard to the prosecution of the Westray case. In light of the input Mr. Kaufman received, he concluded that a review of the Westray prosecution would involve a significant commitment of time and resources, and therefore delay the publication of his conclusions and recommendations. We were therefore retained to conduct the review of this prosecution under his supervision.

The mandate for Mr. Kaufman from the Minister of Justice was broad. No limitations were placed on our inquiries other than strictures dictated by common sense and the formidable volume of material generated by the various investigative agencies and prosecution efforts over a six-year time span. Assurances were provided to Mr. Kaufman by the Minister of Justice and Martin E. Herschorn, Q.C., Deputy Director of Public Prosecutions, of complete cooperation, and this, in fact, was given.

Mr. Kaufman asked us to focus our review on the decision by the PPS to discontinue the prosecution and to attempt to determine why it took so long to reach this decision. In addition, it appeared clear that the prosecution effort experienced problems almost from the outset and we were mandated to do an external examination of this aspect of the prosecution effort. There was no set

time for us to complete our work, but we undertook to do so as expeditiously as possible.

At the outset of our retainer we set out an organizational outline. It identified three phases of our proposed review. The first phase was to determine the facts surrounding the Crown's decision to enter the Stay of Proceedings. This would require a review of the documentary materials concerning the decision to terminate the prosecution and interviews of the individuals involved in formulating the recommendation and its ultimate implementation. Key to this work would be to also carry out an examination of the legal principles that were used by the PPS.

As a prerequisite to our examination of the decision to stay, it was recognized we needed to review the investigative materials and Crown work product. It was anticipated that we would become acquainted with the activities and the work of the prosecution team from its formation until the completion of its opinion in June 1998.

The second phase of our review would focus on the issue as to why it took so long for the Crown to come to its conclusion that it did not have a reasonable chance of conviction. This would raise the ancillary issue as to why did the first trial team not come to the same conclusion.

The third and last phase would be an examination of the original prosecution effort. This examination would not only look at the problems the prosecution service encountered in resourcing and staffing, but also, it would assess the various criticisms made against the Public Prosecution Service.

The proposed steps that we outlined in fulfilling these phases have, with only one or two exceptions, been followed.

Interim Report

We have earlier reported to Mr. Kaufman in our letter of June 16, 1999, on the basis upon which the Westray prosecution was discontinued.

This interim report was done with the expectation that it would be made available to the Attorney General. It had never been suggested that the purpose of the review, and hence our work, would be for the purpose of coming to our own conclusion or make recommendations as to whether or not the Stay of Proceedings that had been entered on June 30, 1998, should be lifted and the proceedings recommenced. As pointed out in our letter of June 16, 1999, it was recognized that our examination and report to the Attorney General could have relevance to that issue. It was recognized that if we were to report to Mr. Kaufman that the exercise of the Crown's discretion to enter a Stay of Proceedings was unreasonable or that they had acted on some wrong principle that this could well give to the Attorney General the necessary basis to cause him to reexamine the issue as to whether or not he ought to exercise his constitutional and statutory power to recommence the proceedings or to even prefer a new indictment.

In our letter of June 16, 1999, we set out in a summary fashion our review of the recommendation made by the Westray prosecution team that a Stay of Proceedings be entered and the situation that caused the Crown to make that recommendation. In a general way, we concluded that, keeping in mind the principles with respect to interfering with the exercise of discretion, there was no clear basis to interfere in the discretion that was recommended to be exercised by the prosecution team and accepted by the Deputy Director of Public Prosecutions and the then Attorney General in June of 1998.

General Approach to Our Review

There is something inherently unfair in judging with the benefit of hindsight what others have done

or not done. This is nothing more than a recognition that it is a rare human endeavour that cannot be criticized with the benefit of hindsight. We have therefore taken the approach that any action or decision or opinion by the Crown throughout the prosecution effort should only now be criticized if the decision or action taken was *unreasonable at the time*.

It is important to point out that we are not a commission of inquiry. No formal hearings have been held with counsel presenting evidence and witnesses being subject to examination and cross-examine under oath. We have enjoyed, for the most part, excellent cooperation from everyone we have approached and all requests for documentation have been fulfilled. Our findings and conclusions are based on the materials we have reviewed and our interviews of the appropriate individuals. There are in excess of 300,000 documents assembled by the prosecution effort. Many of these are multiple pages. In addition, not all documentation was catalogued in a data base. It is obvious that we have not reviewed all of the materials. However, through our own investigations, and in consultation with the prosecution team members and others, we believe we have had access and have reviewed all materials that are relevant and material to the opinions and ultimate recommendation by the Westray prosecution team to enter a Stay of Proceedings and to the work done by the prosecution throughout the period 1992-1998. If there exists other material, we have not been directed to it throughout our review.

Shortly after commencing our work it became evident that although there were hundreds of thousands of documents and the Crown's witness list would end up somewhere between 200 and 300 witnesses, the outcome of the case would be heavily dependent on the opinions of expert witnesses. We therefore reviewed all the available reports of experts who had examined and/or provided opinion evidence with respect to the operation of the Westray mine, including the issues of the ignition and propagation of the explosion of May 9, 1992. A number of these experts had also provided reports and given evidence before the Westray Mine Public Inquiry conducted by Justice K. Peter Richard.

We carried out interviews with all members of the first and second prosecution teams.¹ The second prosecution team continued the practice initiated by the first of setting agendas for regular meetings and recording minutes. In addition, many of the team members kept their own binders of personal notes. As might be expected, some individuals made extensive notes and were able to recall in some detail the course of their work. Others did not. Without the benefit of contemporaneous notes, their recollections were understandably more general in nature.

To put into proper perspective and to understand the tasks faced by the second Westray prosecution team, it is first necessary to set out the legal framework for what it was the Crown would actually have to prove at a trial and the appropriate principles to be applied by the Crown in exercising its discretion as to whether or not a case proceeds to trial.

SECTION II - THEORETICAL FRAMEWORK

A. THE CHARGES

To better understand the concerns that the Westray prosecution team entertained, it is first necessary to appreciate what it was the Crown had to prove.

On March 23, 1993, more than nine months after the disaster, the RCMP delivered to the Public Prosecution Service a seven box "Court Brief" prepared by their investigative team, headed by S/Sgt. Ches MacDonald. This was during a Crown hiatus of sorts. Crown Attorneys Christopher W. Morris and Stephanie Cleary had been providing pre-charge advice to the RCMP. On February 22, 1993, they asked to be relieved of their responsibilities, mostly due to their perception that funds would not be committed to properly staff and resource the anticipated prosecution.

¹ The first trial team consisted of Herman C. Felderhof, Peter Rosinski, G. Arthur Theuerkauf, and Andrew S. Macdonald. The second prosecution team comprised Marc C. Chisholm, Q.C., Robert P. McCarroll, Robert C. Hagell, G. Arthur Theuerkauf, Robert F. Fetterly, and Andrew S. Macdonald. It should also be noted that in 1992 and in early 1993 Crown Attorneys Christopher W. Morris and Stephanie Cleary had been assigned to the file but resigned from it prior to charges being laid. Their role in the handling of the file will also be considered.

A request for volunteers was sent throughout the PPS by the then Director of Public Prosecutions, John Pearson. In addition, funding approval had been secured from the government. The prosecution team of Herman C. Felderhof, Peter Rosinski, and G. Arthur Theuerkauf was assembled on April 19, 1993, the day before the RCMP laid the criminal charges.

On April 13, 1993, John Pearson wrote a lengthy letter to Chief Superintendent Ralph Falkenham of the RCMP. The letter was a follow-up to a meeting held on April 1, 1993, in which the RCMP had requested advice concerning the wording of the charges. Mr. Pearson set out in a clear and concise manner the law with respect to criminal negligence causing death and unlawful act manslaughter. He provided suggested wording for the charges.

It was anticipated that Curragh Inc., Gerald Phillips, and Roger Parry would each be charged with 2 offences. John Pearson suggested that there be a single count charging criminal negligence in that by the manner in which they operated the coal mine or in omitting to do their duty under the *Occupational Health and Safety Act* and *The Coal Mines Regulation Act*, they showed wanton and reckless disregard for the lives and safety of other persons and did thereby cause the deaths of the 26 miners. The second count suggested was one of unlawful act manslaughter, alleging that they committed acts contrary to *The Occupational Health and Safety Act* and *The Coal Mines Regulation Act* and that they did thereby cause the deaths of the miners, contrary to s. 236 of the *Criminal Code*.

Herman C. Felderhof and G. Arthur Theuerkauf commenced their responsibilities on April 19, 1993.

S/Sgt. MacDonald swore a two count Information on April 20, 1993. The first count made the general allegation that Curragh Inc., Gerald Phillips, and Roger Parry did by means of unlawful acts or omissions cause the deaths of the miners contrary to s. 236 of the *Criminal Code*. The second

count alleged that the three accused, by the manner in which they operated a coal mine, or in omitting to do anything that it was their duty to do, showed wanton and reckless disregard for the lives or safety of other persons and did thereby cause the deaths of the miners contrary to s. 220 of the *Criminal Code*.

The three accused made an application, prior to entering an election, to quash the charges on the basis that the wording of the charges did not give fair notice to the accused of the allegations against them. Curran Prov. Ct. J. concluded that the allegations were fundamentally deficient in that they alleged things happened or didn't happen over an eight-month period without giving any indication to the accused of what those things might be. As the Provincial Court Judge at that stage did not have any power to amend or to order particulars, both counts were quashed. The decision was rendered July 20, 1993.²

While not necessarily agreeing with the decision of Curran Prov. Ct. J., the Crown advised the police that it may be more expedient to simply lay new charges as opposed to appealing Judge Curran's decision. A new Information was sworn on July 23, 1993. The Information this time contained three counts. All three accused were jointly charged that between the 10th day of September, 1991, and the 10th day of May, 1992, they did show wanton and reckless disregard for the lives or safety by the persons in the operation of Westray Coal Mine. The charge then set out 13 different ways that it was alleged that they acted or failed to act and did thereby cause the deaths of the 26 miners and commit criminal negligence causing death contrary to s. 220 of the *Criminal Code*.

The second count was solely against Gerald Phillips and Roger Parry. It charged that they between the 10th of September, 1991, and the 10th of May, 1992, did cause the deaths of the 26 miners by means of an unlawful act. The count particularized that unlawful act as being a contravention of s.

² (1993), 124 N.S.R. (2d) 58 (N.S. Prov. Ct.).

70(1) of the *Coal Mines Regulation Act* which provided³ :

Unless the floor, roof and sides of the road and working places in a mine are naturally wet throughout, they shall be systematically cleared so as to prevent, as far as practicable, the accumulation of coal dust, and systematic steps either by way of watering or otherwise shall be taken to prevent explosions of coal dust occurring.

and that they did thereby commit manslaughter contrary to s. 236 of the *Criminal Code*.

The third count in the Information charged that Curragh Inc., between the same dates, did cause the deaths of the 26 miners by means of an unlawful act. The unlawful act was particularized as conducting its mine operation so that the employees were exposed to health or safety hazards of excessive accumulation of coal dust without taking systematic steps to prevent explosions of coal dust occurring contrary to s. 9(1)(f) of the *Occupational Health and Safety Act* and did thereby commit manslaughter contrary to s. 236 of the *Criminal Code*.

Proceedings were again brought by the three accused to quash these charges. The application was heard before Curran Prov. Ct. J. The application was dismissed in a decision dated October 26, 1993.⁴

The Information dated July 23, 1993, and the proceedings in Provincial Court, were superseded by the preferral of an Indictment dated May 18, 1994, by Herman C. Felderhof, agent of the Attorney General.⁵ The full text of the indictment is set out in Appendix "A", at Tab 1. The counts in the indictment followed closely the charges set out in the Information dated July 23, 1993. Counts 2

³ The past tense is used throughout this report on references to the provisions of the *Coal Mines Regulation Act* R.S.N.S., 1989, c. 73, because legislation has been enacted to repeal that Act (see: *Occupational Health and Safety Act* S.N.S., 1996, c. 7). However, the provisions of the new *Occupational Health and Safety Act* repealing the *Coal Mines Regulation Act* [s. 86, S.N.S. 1996, c. 7] have not yet been proclaimed.

⁴ (1993), 125 N.S.R. (2d) 185 (N.S. Prov. Ct.).

⁵ For the details surrounding the preferral of the Indictment see pp. 220-221.

and 3 in the indictment alleging unlawful act manslaughter against Gerald Phillips and Roger Parry and Curragh Inc. were identical to counts 2 and 3 in the Information dated July 23, 1993.

The joint charge against Curragh Inc., Gerald Phillips, and Roger Parry of criminal negligence causing death was the same in format. Rather than alleging 13 areas in which the accused were alleged to have shown wanton or reckless disregard for the lives and safety of others, some of the allegations were eliminated, while others were consolidated. It resulted in seven particulars. They were:

- (a) allowing excessive amounts of coal dust to accumulate and failing to render it harmless;
- (b) failing to provide or use adequate stone dust, or other fire and explosion suppressants;
- (c) allowing excessive amounts of methane gas to accumulate and failing to render it harmless;
- (d) failing to provide proper ventilation;
- (e) allowing the use of equipment and materials in an unsafe manner;
- (f) failing to properly use monitoring devices and systems;
- (g) assigning employees to duties for which they were not properly qualified.

It is obvious that there is considerable overlap between the count charging criminal negligence causing death and the two counts charging manslaughter against Gerald Phillips and Roger Parry and against Curragh Inc. In the criminal negligence count, it is alleged in particulars (a) and (b) that the accused showed wanton or reckless disregard in allowing excessive amounts of coal dust to accumulate and failing to render it harmless and in failing to provide or use adequate stone dust.

The allegations in the manslaughter counts allege essentially the same things as the basis for criminal liability.⁶

Criminal Negligence

Section 219 of the *Criminal Code* defines criminal negligence as follows:

219. (1) *Every one is criminally negligent who*
 (a) *in doing anything, or*
 (b) *in omitting to do anything that it is his duty to do,*
 shows wanton or reckless disregard for the lives or
 safety of other persons.
- (2) *For the purposes of this section, "duty" means a duty*
 imposed by law.

In a general way, the Crown would have been required to prove beyond a reasonable doubt the following:

- date, time, and place of the offence
- that the acts or omissions of the accused caused the deaths of any one of the 26 miners
- that the acts or omissions of the accused showed a wanton or reckless disregard for the lives or safety of other persons
- identity of the accused

There was no question that the Crown could establish beyond a reasonable doubt that the accused had a duty to operate the mine in a safe manner.⁷

⁶ More overlap was possible in that charges could well have been laid of unlawful act manslaughter by alleging a violation by the accused of specific provisions in the *Coal Mines Regulation Act* with respect to ventilation. However, since nothing turns on this issue, there is no need to engage in an analysis of it.

⁷ The duties of the Manager and Underground Manager are set out in the *Coal Mines Regulation Act*. In addition, the *Occupational Health and Safety Act* and the common law could be said to impose such a duty.

In relation to the requirement of establishing "wanton or reckless disregard," "reckless" simply means that a person shows carelessness for the consequences of his or her act, so far as the lives or safety of other persons are concerned. Although "wanton" is a word with much the same meaning, it is said to include the notion of not only an indifference to consequences, but adds the requirement, not just of indifference but heedless of those consequences or without any regard for them.⁸ Although the issue is not completely settled, all indications are that the requirement of proving wanton or reckless disregard is to be determined on an objective basis. It is clear that mere civil negligence is not sufficient. There must be gross negligence or wanton misconduct. The impugned conduct must constitute a marked and, some would say, substantial departure expected of a reasonably prudent person in the circumstances.

One of the legal issues that has not yet been definitely settled is the *mens rea* requirement for this offence. The confusion appears to have started with the decision of the Supreme Court of Canada in *O'Grady v. Sparling*.⁹ The issue in that case was whether or not a provincial careless driving statute was constitutionally invalid on the basis that it was legislation in relation to criminal law and that Parliament had already occupied the field by enacting the offence of criminal negligence. The court held that the provincial legislation was within the constitutional authority of the province on the basis that it dealt with inadvertent negligence, that is, a negligence that was assessed solely on an objective standard. This was contrasted to the offence of criminal negligence which required "advertent" negligence which was based on a subjective awareness by the accused of the risk to the lives and safety of others.

In a decision by the Supreme Court of Canada, the difference in the two approaches was identified. In addition, it was noted that the distinction, as the risk of harm increases, can diminish.

⁸ *R. v. Canadian Liquid Air* (1972), 20 C.R.N.S. 208 (B.C.S.C.) p. 210; *R. v. Waite* (1986), 28 C.C.C. (3d) 326 (Ont. C.A.); aff. 48 C.C.C. (3d) 1 (S.C.C.).

⁹ [1960] S.C.R. 804.

In *R. v. Anderson*,¹⁰ Sopinka J., speaking for the court, wrote:

In both the objective and subjective approaches, the court is determining foreseeability of consequences. In a civil negligence case concerned with adjustment of losses, the connection between conduct and consequences is often quite tenuous. The mythical reasonable man has been equipped with a great deal of clairvoyance in order to compensate the innocent victim. Often the defendant will not, in fact, have foreseen the consequences of his negligent acts for which he is held accountable on an objective basis. In a criminal case the connection must be more substantial.

To establish recklessness, the consequences must be more obvious. That is the rationale for the requirement of a marked departure from the norm. The greater the risk created, the easier it is to conclude that a reasonably prudent person would have foreseen the consequences. Equally, it is easier to conclude that the accused must have foreseen the consequences. It is apparent, therefore, that as the risk of harm increases, the significance of the distinction between the objective and subjective approaches decreases. The ultimate in this process of reasoning is reached when the risk is so high that the consequences are the natural result of the conduct creating the risk. The conduct in such circumstances can be characterized as intentional.

pp. 485-486

In subsequent cases, the Supreme Court of Canada has erected clear sign posts to the conclusion that an objective, or at least a modified objective standard, will be upheld as an appropriate balance between a finding of criminal liability only when there is an element of moral blame and the legitimate goal of protecting society from those persons who act in a manner that is a marked departure from the norm.¹¹ In a recent article, Justice Peter Cory wrote:

¹⁰ (1990), 53 C.C.C. (3d) 481 (S.C.C.).

¹¹ There is certainly ample authority for the application of an objective standard. *R. v. Waite*, *supra*; *R. v. Nelson* (1990), 54 C.C.C. (3d) 285 (Ont. C.A.); *R. v. Thomas* (1990), 53 C.C.C. (3d) 245 (B.C.C.A.); *R. v. Ubhi* (1994), 27 C.R. (4th) 332 (B.C.C.A.).

... I think the foregoing review suggests certain factors can indicate when criminal responsibility may properly be imposed on the basis of an objective fault standard:

- (1) the first involves the nature of the accused's conduct: it must involve more than negligence in the civil sense and must involve a gross or marked departure from accepted norms.*
- (2) the second relates to the nature of the activity undertaken: where the activity involves inherent danger or risk to the lives or safety or others, the more we expect people to be alert and careful. It is in this context that not thinking or a demonstrated lack of due care imports moral blameworthiness.*

As Professor Duff has stated, "... the negligent agent does not choose to cause, or to risk, harm. But negligence surely is a species of fault, albeit less serious than recklessness: we properly blame people for their negligence." Put differently, even though negligence-based offences censure the consequences of mindless action, being mindless can be blameworthy, particularly where these factors -- a marked departure from accepted norms, and an activity involving inherent risk -- are both present.

If "negligence" is given its ordinary meaning, the "criminal negligence" provisions in the Code may very well be aligned in some way with the objective fault standard set out in Hundal and Creighton. Notably, criminal negligence constitutes an offence only where an accused causes death or bodily harm through criminally negligent action. As such, it will most likely arise where risky or potentially harmful activity is undertaken. In this context, it may be sensible and fair to impose liability on an objective basis, and if so, it must be done in accordance with the guiding principles that underlie negligence-based offences generally -- i.e. the accused is assessed on the basis of the reasonable person standard; the accused's conduct must show a marked departure from that standard; and, finally, careful consideration should be given to all the circumstances of the offence, including the accused's personal capacity to meet the standard. These principles strike a balance between the fundamental principle that criminal responsibility must not be imposed absent an element of moral blameworthiness, and society's interest in protecting the innocent from harm caused by those acting in a manner that is a

*marked departure from the norm.*¹²

There appears to be no difficulty whatsoever in the Crown establishing the identity of the various accused. However, the issue of causation did, at times, give the Crown considerable concern. The element of causation is common to both of the allegations of criminal negligence causing death and manslaughter. It is more convenient to set out the legal principles surrounding this requirement in the section dealing with manslaughter.

Manslaughter

The manner in which homicide is treated by Canadian criminal law is simple in its approach. Homicide is either culpable or non-culpable. Homicide that is not culpable is not an offence.

Culpable homicide is either murder, manslaughter, or infanticide.

A person commits culpable homicide when he or she causes the death of a human being by means of an unlawful act.¹³

Taken at its highest, the elements that the Crown must prove beyond a reasonable doubt for the offence of unlawful act manslaughter are:

- date, time, and place alleged in the indictment
- that the accused caused the death of one or more of the miners named
- the act causing death was unlawful
- that the commission of the unlawful act was intentional
- identity of the accused

¹² "Criminal Negligence", National Criminal Law Program, Federation of Law Societies of Canada (1998), Vol. I, sec 1.1, p. 11-12.

¹³ S. 222(5)(a)-(d), *Criminal Code*.

- that it was foreseeable that the commission of the unlawful act would create a risk of bodily harm

The unlawful act that is the predicate requirement of manslaughter does not have to be criminal. The unlawful act can be an offence prohibited by federal or provincial statute where the conduct involves a dangerous act, is not an offence of absolute liability and is not unconstitutional.¹⁴ The "dangerous act" must involve a foreseeable risk of bodily harm. There is no need to prove that the accused intended to cause death or bodily harm. The Crown need only prove that the accused ought to have foreseen the risk of bodily harm where the harm is neither trivial nor transitory. The Crown does not have to prove that the accused actually foresaw or intended bodily harm, only that the accused intended the commission of an act that was unlawful.¹⁵

Causation

The seminal case in Canada with respect to the element of causation was a manslaughter case, *R. v. Smithers* (1977), 34 C.C.C. (2d) 427 (S.C.C.). The accused had responded to insults by kicking the deceased in the stomach. The kick did not result in any damage to the deceased. It did, however, induce vomiting. For unknown reasons, the deceased's epiglottis malfunctioned which caused the aspiration of vomit. Death ensued.

The Supreme Court of Canada upheld the conviction for manslaughter. It held that an accused will be criminally liable for causing death if the act of the accused is a contributing cause outside the *de minimus* range. Despite the suggestion that criminal liability for offences such as manslaughter based on the unlawful acts of the accused that are only a contributing cause to the death may not withstand constitutional challenge,¹⁶ the test remains the law today.

¹⁴ See *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 (S.C.C.) at p. 371; *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124 (S.C.C.) at p. 133.

¹⁵ *R. v. Creighton*, *supra*.

¹⁶ *R. v. F. (D.L.)* (1989), 73 C.R. (3d) 391 (Alta. C.A.); See also D. Stuart, *Canadian Criminal Law*, 3rd Edition at p. 125.

The breadth of the *Smithers* test is seen in the more recent decision of *R. v. Shanks* (1997), 4 C.R. (5th) 79 (Ont. C.A.). The accused confronted the deceased at his home. The accused was upset that some injuries had been caused to one of his pets. He threatened the deceased and provoked him into agreeing to fight. The deceased was a very sick man. He had high blood pressure, a history of strokes, and had suffered at least one previous heart attack. When the deceased went outside there was a brief physical encounter and he was put down to the ground by the accused.

Approximately 2 hours later he suffered an acute heart attack and died. Death came from an acute plaque rupture which lead to a blockage of blood going to his heart. Medical evidence at trial demonstrated that either emotional or physical stress or a combination of both may trigger a plaque rupture. Medical evidence was also that there was an 80-90% probability that the plaque rupture may have occurred without the physical assault. Nevertheless, the trial judge convicted the accused after finding that the physical assault alone was a contributing cause of death outside the *de minimus* range.

The Ontario Court of Appeal upheld the conviction for manslaughter, noting that triers of fact are not restricted to the medical opinions that are tendered before them. It was a medical fact that the continuum of events from the initial threats by the accused to his throwing of the deceased to the ground was certainly the cause of death.¹⁷

It cannot seriously be doubted that the same test of causation applies for the offence of criminal negligence causing death. In *R. v. Pinsky* (1988), 6 M.V.R. (2d) 19 (B.C.C.A), the accused was acquitted at trial. The jury had been directed that the accused's driving had to be a *substantial* cause of the accident. The British Columbia Court of Appeal found that this was a misdirection. The court concluded that the jury should have been instructed that it was sufficient if the jury found beyond a reasonable doubt that the criminally negligent driving of the accused was a contributing cause of death, outside of the *de minimus* range. On appeal to the Supreme Court of Canada, the

¹⁷ A more restrictive approach to the causation issue is demonstrated in *R. v. DaSilva-Spence* (1997), 10 C.R. (5th) 372 (Alta. C.A.).

court specifically adopted the reasons of the British Columbia Court of Appeal and upheld the order for a new trial.¹⁸

In addition, the *Smithers* test has been applied by numerous appellate courts across the country for other offences requiring a causative link between conduct and consequences.¹⁹ This conclusion is in accord with a long line of cases that have held that the contributory negligence of the deceased or others does not absolve an accused from liability.²⁰

B. POWER TO TERMINATE

Discretionary power is found at every level of the administration of justice, from police decisions on arrest, investigation and charges, to the myriad powers of the Crown and finally in the judicial process itself. Discretionary decisions by the police arguably have the most impact yet are virtually hidden from public view.²¹ As pointed out by John L. J. Edwards, decisions of the judiciary follow the model of openness and public accountability. The other decisions inherent in the criminal administration of justice do not. Edwards writes:

The factors that control the outcome of discretionary authority in the area of law enforcement and criminal prosecutions have been aptly described as exhibiting the quality of low visibility. Calls for the public disclosure of the reasons behind individual decisions is symptomatic of a growing unwillingness to accept unquestioningly the exercise of authority whether by government, statutory bodies or other public institutions. The model frequently invoked as epitomising openness and public accountability is the long established tradition

¹⁸ [1989] 2 S.C.R. 979.

¹⁹ *R. v. Larocque* (1988), 5 M.V.R. (2d) 221 (Ont. C.A.); *R. v. F. (D.L.)* (1999), 52 C.C.C. (3d) 357 (Alta. C.A.); *R. v. Ewert* (1989), 53 C.C.C. (3d) 153 (Alta. C.A.). The Authorities were reviewed in *R. v. White* (1994), 130 N.S.R. (2d) 143 (N.S.C.A.).

²⁰ See for example, *R. v. Yarmouth Light and Power Company Limited* (1920), 34 C.C.C. 1 (N.S.S.C.); *R. v. Canadian Utilities* (1954), 110 C.C.C. 251 (Alta. S.C.); *R. v. Fortin* (1957), 121 C.C.C. 347 (N.B.C.A.); *R. v. Doubrough* (1977), 35 C.C.C. (2d) 46 (Ont. Co.Ct.).

²¹ Goldstein, "Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions at the Administration of Justice" (1960), 69 *Yale Law Journal*, 543; Grosman *Police Command Decisions and Discretion* (1975); *Police, A Policy Paper* Law Reform Commission of Canada (1980) p. 5.

*of the judiciary in giving reasons in open court for their decisions. The nature of the adversary system supports judicial commitment to this ideal with its concern for identifying the legal issues before the trial commences and for confirming the admissibility of evidence to what is relevant in accordance with well established rules. Far less certainty prevails in those other areas of the administration of justice that are concerned with the preliminary steps leading up to the actual trial of a criminal case.*²²

Prosecutors exercise discretionary powers at various junctures in the criminal process. This includes such things as charge approval (to a greater or lesser extent in some jurisdictions), the decision to proceed with or terminate a prosecution, position on bail, election of the procedure for hybrid offences, to conduct plea negotiation, the calling of witnesses at a preliminary inquiry or trial, submissions to make, position on sentence, and whether or not to appeal.²³

The existence of discretion on the part of the police and Crown constitute a fundamental and essential principle in our criminal justice system. This was expressed by Lamer J., as he then was, in *R. v. Beare*:

*Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.*²⁴

²² John L.I. J. Edwards, *The Attorney General, Politics and the Public Interest* (1984), p. 403.

²³ See for example, *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609 (S.C.C.) p. 638-9; Morris Manning, "Abuse of Power by Crown Attorneys", [1979] L.S.U.C. Lectures 571.

²⁴ *R. v. Beare* (1988), 45 C.C.C. (3d) 57 (S.C.C.), p. 76. See also *R. v. T(V)* (1992), 71 C.C.C. (3d) 32 (S.C.C.); *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.).

The discretion of the Attorney General, and his or her agents, to assume control over criminal proceedings is based on the constitutional principle that all criminal prosecutions are conducted in the name of Her Majesty the Queen. The Attorney General, as her chief law enforcement officer, has this power.²⁵

The exact origin of the plea of *nolle prosequi* is uncertain, but the existence of this discretionary power by the Attorney General at common law is unquestioned. It is a directive to the court that the Attorney General is unwilling to prosecute and the entry of a *nolle prosequi* has the effect of staying or suspending the proceedings.²⁶ The power of the Attorney General to enter a stay is not subject to any control. Historically, it is an unfettered discretion.²⁷ This is not to say that the Attorney General is a despot making arbitrary and indiscriminate decisions. As pointed out by Edwards, the Attorney General remains responsible to Parliament for the manner in which he or she exercises the discretionary powers of the office.²⁸

It cannot be gainsaid that the exercise of discretion in deciding whether or not to prosecute is a factor of great importance in the administration of the criminal law.²⁹ It is not only critical for an individual accused but for society in general. The importance of this power has been recognized by many. For example:

*The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defence counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.*³⁰

²⁵ Stephen, *History of the Criminal Law of England* (1883), Volume 1, p. 496, 499.

²⁶ J.L.I.J. Edwards, *The Law Officers of the Crown* (1964) p. 227, *et seq.*; *R v. Poole*, [1961] A.C. 223 (J.C.P.C.).

²⁷ With the advent of the *Charter* and the more recent principles surrounding the availability of redress for abuse of process, it cannot be gainsaid that there is some measure of control by the judiciary. See *R. v. Scott* (1990), 61 C.C.C. (3d) 300 (S.C.C.); *R. v. Cole* (1998), 126 C.C.C. (3d) 159 (N.S.S.C.); *R. v. Pasini* (1991), 63 C.C.C. (3d) 436 (Que.C.A.); 71 C.C.C. (3d) 573 (S.C.C.); see also, *R. v. G(S.G.)* 1997, 116 C.C.C. (3d) 193 (S.C.C.) at p. 213; *R. v. Durack* (1998), 168 Sask. R. 36 (C.A.).

²⁸ J.L.I.J. Edwards, *The Law Officers of the Crown* (1964) p. 227.

²⁹ Glanville Williams, "Discretion in Prosecuting", [1956] Criminal Law Review, 221.

³⁰ Carol A. Corrigan, (1986) 13 *Hastings Constitutional Law Quarterly*, p. 537.

*The discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution, gives him more control over an individual's liberty and reputation than any other public official."*¹¹

*Deciding whether to prosecute is among the most important steps in the prosecution process. Considerable care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute and, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system."*¹²

Despite the well recognized importance of a proper exercise of the discretionary power by the Crown, it has only been in relatively recent years that there has been any revelation to the public of how this power is exercised. This is a development that Edwards attributes to the practice of Sir Thomas Hetherington, who assumed the office of the Director of Public Prosecutions in England in 1977, of explaining in detail in public forums how decisions were made.¹³

The approach elucidated by the Director of Public Prosecutions in England was first to determine if there were any insurmountable legal or jurisdictional obstacles to the prosecution. If there were not, the sufficiency of the evidence was then assessed. Although expressed as the 51% rule, that is, that it must be more likely there would be a conviction than an acquittal, the policy, in fact, left room for applying a higher standard in some cases:

Different wording has been used on occasion to explain the governing test, some less felicitous than others, and we can begin by referring to the Director's written submission in 1978 to the Royal Commission on Criminal Procedure in which Hetherington stated: "The test normally used in the Department . . . is whether or not there is a reasonable prospect of a conviction: whether, in other words, it seems rather more likely that there will be a conviction than an

¹¹ "Prosecutor's Discretion" (1955), Univ. of Penn. Law Review, p. 1057.

¹² "The Decision to Prosecute", Dept. of Justice (Canada), (1993).

¹³ John L. J. Edwards, The Attorney General Politics and the Public Interest (1984), 405-7; See also Lezak and Leonard "The Prosecutor's Discretion: Out of the Closet - Not Out of Control" (1984), 63 Oregon Law Review, 247.

*acquittal. We set an even higher standard if an acquittal would or might produce unfortunate consequences. For example, if a man who has been convicted of some offence is subsequently acquitted of having given perjured evidence at his trial, that acquittal may cast doubt on the original conviction. Likewise, an unsuccessful prosecution of an allegedly obscene book will, if the trial has attracted publicity, lead to a considerable increase in sales. In such cases we are hesitant to prosecute unless we think the prospects of a conviction are high. We also tend to adopt a somewhat higher standard if the trial is likely to be abnormally long and expensive and the offence is not especially grave."*¹⁴

The adoption of an inflexible 51% rule has its detractors. While recognizing that there must be an assessment of sufficiency of evidence,¹⁵ Glanville Williams favoured the addition of the requirement of the prosecutor's subjective belief, supported by objective grounds, in the guilt of the accused. He wrote:

The likelihood of conviction

*To justify a prosecution, there must be, at the least, a likelihood, or reasonable possibility, of conviction. This rule, with which I think everyone would agree, is dictated in part by considerations of economy, and in part by justice and prudence. The prosecutor's subjective belief in guilt may be mistaken. It must, therefore, be supported by objective evidence that may reasonably satisfy a court of trial. Sometimes it is almost as bad for an innocent person to be prosecuted as to be convicted."*¹⁶

He suggested the proper practice in exercising the discretion to be:

The prosecutor should consider (1) whether he believes the suspect to be guilty, and if so (2) whether a prosecution would have a fair chance of success

¹⁴ John L.I. J. Edwards, *The Attorney General, Politics and the Public Interest* (1984), 413-414.

¹⁵ "Discretion in Prosecuting", [1956] *Crim. L. Rev.*, 221.

¹⁶ "Letting Off the Guilty and Prosecuting the Innocent", [1985] *Crim. L.R.* 115.

(not necessarily a better than evens chance), and (3) whether considerations of humanity or public policy stand in the way of proceeding. Then he must decide (4) whether he has the resources to justify bringing a charge, having regard to the importance of bringing the defendant to court, the likelihood of success, and the likelihood of a disposal that will be regarded by the prosecutor as adequate. (Indulgent and even piffling sentences, which are all too common in some types of case, such as assault and reckless driving, can readily make the police believe that it is not worth wasting their time on cases of that type.)

Given that the answers to these questions are favourable to proceeding, the prosecutor should normally go ahead. It is particularly important that he should do this where he believes that a public officer is guilty of corruption, fraud or violence.³⁷

There are detractors from solely relying on a prosecutor's belief rule on the basis that it comes perilously close to permitting prosecutors to make decisions based on *animus* towards an accused that he or she believes to be guilty rather than in a fair and impartial manner as dictated by his or her overall duty to society in general.³⁸

The applicable standards in the United States vary widely. The American Bar Association (ABA) Model Rules of Professional Conduct only require that a prosecutor in a criminal case shall:

(a) *Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.*³⁹

³⁷ *Ibid.* p. 117.

³⁸ See for example, Donna Morgan, "Controlling Prosecutorial Powers - Judicial Review, Abuse of Process in Section 7 of The Charter" (1986-87), 29 *Crim. Law Q.* 15, at p. 18-21; *Whitehorn v. The Queen* (1983), 152 C.L.R. 657 (N.Z.); *Boucher v. The Queen* (1954), 110 C.C.C. 263 (S.C.C.); Similar comments were expressed by the United States Supreme Court in *Berger v. The United States* 395 U.S. 78; 55 S. Ct. 629 (1935): The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

³⁹ "Model Rules of Professional Conduct", American Bar Association Centre for Professional Responsibility, (1993), Rule 3.8 at p. 83.

The National District Attorneys Association (NDAA) developed a set of charging guidelines in 1977 that adopted a similarly low level threshold.⁴⁰ The NDAA Prosecution Standards lists as one factor that a prosecutor may consider in making a decision to be "the probability of conviction".⁴¹ The ABA Standards, which are advisory, provide:

*3-3.9: (a) It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.*⁴²

The ABA Standards go on to provide that a prosecutor may decline to prosecute, notwithstanding that sufficient evidence does exist which would support a conviction, on public interest factors which include such issues as "the prosecutor's reasonable doubt that the accused is in fact guilty."⁴³

The California District Attorney's Association adopted uniform crime charging standards which are useful to repeat:

The prosecutor should charge only if the following four basic requirements are satisfied:

- a. The prosecutor, based on a complete investigation and a thorough consideration of all pertinent data readily available to him, is satisfied that the evidence shows the accused is guilty of the crime to be charged.*
- b. There is legally sufficient, admissible evidence of a corpus delicti.*

⁴⁰ Ethical Issues in Prosecution, Dean John J. Douglas, National College of District Attorneys (Houston, Texas).

⁴¹ Hall, Professional Responsibility of the Criminal Lawyer (1987).

⁴² *Ibid.* p. 205.

⁴³ *Ibid.* p. 205-6.

- c. *There is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime charged.*
- d. *The prosecutor has considered the probability of conviction by an objective fact-finder hearing the admissible evidence. The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact-finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defence that could be raised under the evidence presented to the prosecutor."*

The obligation to evaluate the prosecution case is obviously a continuing one and if new information comes to light that causes the prosecutor to have a valid serious reasonable doubt as to the guilt of an accused, then the charges should be dismissed.⁴⁵

Canadian Guidelines

The Federal Department of Justice and most provincial jurisdictions have policies that set out the parameters for the exercise of discretion by the Crown in terminating or discontinuing a prosecution. The issue of what is the appropriate formulation for the threshold test for the Crown to apply in theory, and how it should be applied in practice, has been the subject of numerous reports and studies.⁴⁶

There is a common theme throughout all of the tests concerning the exercise of the Crown's

⁴⁵ As reproduced in 13 Hastings Constitutional Law Quarterly, 537, p.539.

⁴⁶ *Ibid.* p. 541.

⁴⁶ Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor. The Law Reform Commission of Canada, Working Paper 62 (November, 1990); The Owen Report, "Discretion to Prosecute Inquiry" (November, 1990); The Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints (The Hughes Commission); Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussion (The Martin Report, 1992).

discretion to prosecute or not. The Crown must first decide if the evidence is sufficient to justify the institution or continuance of the proceedings. Secondly, if there is sufficient evidence, does the public interest require a prosecution to be pursued.

British Columbia's policy is that the usual evidentiary test is whether there is a "substantial likelihood of conviction." Their Charge Approval Guidelines define this test as:

A substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the Court. In determining whether this standard is satisfied, Crown Counsel must determine:

- (a) what material evidence is likely to be admissible;*
- (b) the weight likely to be given to the admissible evidence; and*
- (c) the likelihood that viable, not speculative, defences will succeed.⁴⁷*

Alberta requires that there be a "reasonable likelihood of conviction."⁴⁸ Saskatchewan requires that the evidence must demonstrate that there is a "reasonable likelihood of conviction."⁴⁹ Manitoba requires that the threshold be met on whether or not there exists a "reasonable likelihood of conviction."⁵⁰ Ontario requires a determination that there is a "reasonable prospect of conviction."⁵¹ Quebec requires that the prosecutor be reasonably satisfied that a conviction can be obtained.⁵² New Brunswick adopts the requirement that there is a "reasonable prospect of

⁴⁷ Crown Counsel Policy Manual. The Charge Approval Guidelines admit of exceptions to this requirement for cases to go forward where there is a high risk violent offender. It still requires that there be a reasonable prospect of conviction which is defined as requiring more than a *prima facie* case but not requiring that a conviction be more likely than not. Standards are also reduced by the Crown only requiring a Crown to consider whether material evidence is *arguably* admissible, other evidence reasonably capable of belief and whether the Crown's evidence is overborne by any incontrovertible defence.

⁴⁸ Criteria for Prosecution, Guideline #40 (April 23, 1993).

⁴⁹ Policy and Practice Directive, No. PRO 4, (June 1, 1998).

⁵⁰ Manitoba Department of Justice Public Prosecutions Policy Directive, Guideline No. 2:INI:1.1 (February 1, 1990).

⁵¹ Ministry of the Attorney General, Province of Ontario Crown Policy Manual, Policy No. C.S.-1 (original date January 15, 1994: updated February 10, 1995).

⁵² Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussion (The Martin Report, 1992), p. 53.

conviction; that is whether a conviction is more likely than an acquittal before an impartial trier of fact properly directed in accordance with the law."⁵³ In Newfoundland, if there is a *prima facie* case, the Crown will proceed unless there is "no probability of conviction."⁵⁴

In Nova Scotia the discretionary power of the Attorney General with respect to prosecutorial decisions was delegated to the office of the Director of Public Prosecutions. The delegation was not absolute.

The office of the Director of Public Prosecutions (DPP) and the Public Prosecution Service were created by the *Public Prosecutions Act*, S.N.S. 1990, c.21. This statute delegated to the DPP responsibility for all prosecutions within the jurisdiction of the Attorney General with the power to conduct such prosecutions independently of the Attorney General subject only to the power of the Attorney General to issue instructions or guidelines. Those guidelines can either be general or in relation to a particular prosecution. The *Act* goes on to give to the Director of Public Prosecutions the authority to issue general instructions or guidelines in respect of all prosecutions or a class of prosecutions, and requires that any such instructions or guidelines be published.⁵⁵

The Public Prosecution Service, in exercising statutory powers given to it, is guided by a Directive on the exercise of prosecutorial discretion. That Directive requires a Crown Attorney to be of the opinion that there is a "reasonable chance" of conviction at trial and that the public interest is best served by a prosecution. The Directive was issued by the DPP June 19, 1992. In relation to the assessment of sufficiency of evidence, the Directive states:

Crown Attorneys will be guided by the principle that a prosecution should only go forward where there is evidence available on each essential element of the offence charged and a Crown Attorney believes there is a reasonable chance

⁵³ Criteria for Prosecutions, Topic 120, New Brunswick Public Prosecutions Operations Manual.

⁵⁴ Department of Justice Crown Attorney's Handbook, "The Decision to Prosecute" Topic No. 300.

⁵⁵ S.N.S. 1990 c. 21, s. 4(e). The DPP may also issue instructions or guidelines in relation to an individual prosecution - s. 4(f).

that conviction will result if the case proceeds to trial. If the available evidence does not meet this standard, the prosecution shall be terminated.

The Public Prosecution Service does not have any further guidelines or statements that elucidate in a more concrete way how a Crown is to make the determination of whether there is or is not a reasonable chance of conviction and thus whether to continue or terminate a prosecution.

The language of the Directive uses the phraseology of the appropriate test that was recommended by the Law Reform Commission of Canada of "reasonable chance of conviction."⁵⁶ However, the commentary by the Law Reform Commission of Canada does not say that it is in any way abandoning the notion of a 51% rule. It is clear that the minimum is a *prima facie* test.⁵⁷ It is also clear that a 51% rule may not be appropriate on its own since it would not permit prosecutions to be brought on the basis that they were unlikely to succeed even where the prosecution *ought* to succeed. The Law Reform Commission of Canada wrote of this test:

We are seeking, therefore, a test that avoids the deficiencies of the 51 percent rule. Accordingly, the guidelines initially required that a prosecution should have a "reasonable chance of success": this phrase more accurately reflects the decision that a conviction is likely. Further, the guidelines should specifically allow for the commencement of a prosecution even where there is not a reasonable likelihood of success, if public - policy reasons favour bringing a charge. This provision will allow for the bringing of charges in cases such as those discussed, essentially non-legal reasons make a conviction unlikely.⁵⁸

⁵⁶ Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor. The Law Reform Commission of Canada, Working Paper 62 (November, 1990), p. 79.

⁵⁷ *Prima facie* case being one where there is evidence on all essential elements of a charge, which if believed by the trier of fact and unanswered, would warrant a conviction. See *Mezzo v. The Queen*, [1986] 1 S.C.R. 802 at 837; (1986), 27 C.C.C. (3d) 97 at p. 102.

⁵⁸ *Ibid.* pp. 81-82.

As stated previously, what is the appropriate formulation of a threshold test that the Crown should apply in theory and how it is to be applied in practice has been the subject of numerous reports and studies.⁵⁹ One of the most thorough and current considerations of the problems associated with the wording of the test and how it should be applied is the report of the Attorney General's Advisory Committee on charge screening, disclosure and resolution discussions, chaired by the Honourable G. Arthur Martin, Q.C.

The Martin Committee considered the various formulations of the threshold in Canada and of a number of common law jurisdictions. The most common formulations of the threshold test require that there be a "reasonable likelihood of conviction" or a "reasonable prospect of conviction" or a "reasonable chance of conviction". Despite the different words used, each of these tests suggest the same basic criteria: that there must be more than a mere *prima facie* case, that is, more than just evidence whereby a reasonable jury, properly instructed, could convict the accused. Differences have emerged as to what is the meaning to be applied to these various tests. The differences centre on the issue of the degree of confidence that a Crown must have that a conviction will result. Many provinces and common law jurisdictions generally require that a conviction be more likely than not. As noted above, this is sometimes referred to as the 51% rule.

The Martin Report recommended that the standard of the threshold test fall somewhere between that of a *prima facie* case and a standard that requires a greater likelihood of conviction than not. The Ontario Ministry of the Attorney General adopted the recommendations of the Martin Report and set the standard as "reasonable prospect of conviction." In guidelines that accompany the Ontario Policy, this test is explained in the following terms:

⁵⁹ Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor. The Law Reform Commission of Canada, Working Paper 62 (November, 1990); The Owen Report, "Discretion to Prosecute Inquiry" (November, 1990); The Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints (The Hughes Commission); Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussion (The Martin Report, 1992).

That above test or standard set out in C.S.-I lies somewhere between the "prima facie case" from Sheppard (which is too low) and the "probability of conviction" standard (which a number of other jurisdiction have adopted but which the Martin Report found to be too high). The term "reasonable prospect of conviction", denoting a middle ground between these two standards, is a legal term of art that is not capable of precise scientific approach. It requires the exercise of prosecutorial judgment or discretion based on objective indicators found in the case itself.

It is interesting to note that the Owens Inquiry in British Columbia recommended that the charge approval standard be changed from "substantial likelihood of conviction" to "reasonable likelihood of conviction." The Criminal Justice Branch response recommended that the standard remain the same. It was made clear that "substantial likelihood of conviction" does not mean that there must be a virtual certainty of conviction. The policy of the Criminal Justice Branch simply requires that it is *likely* that there would be a conviction.⁶⁰

Of all the wordings in play, "reasonable chance of conviction" is the one that comes closest to establishing that there need not be a conclusion that a conviction would be more likely than not. Obviously the use of the word "chance" imports no element of luck but that there be a reasonable degree of probability that the trial will end in a conviction.⁶¹ Both grammatically and in practice, a test that calls for a "reasonable likelihood" or "reasonable prospect"⁶² generally requires a conclusion by an independent and impartial experienced prosecutor that a conviction is more likely than not.

There can be little doubt that even if it is said that the standard is objective, Crown Attorneys will apply their judgment and experience to the issue. As pointed out by John Ll. J. Edwards:

⁶⁰ Criminal Justice Branch Response to the Final Report of Commissioner Owen on the Discretion to Prosecute Inquiry, January, 1991.

⁶¹ The Martin Report (1992), p. 62.

⁶² "prospect" meaning expectation and if one expects an event they believe it will happen which inherently bespeaks of a more likely than not standard.

The truth of the matter lies closer to recognizing the subjective nature of the prosecutorial decision in individual cases, it being at least likely that something less than identical answers would be forthcoming if the same set of files were given to a sample of, say, 20 or 50 professional officers all working in the same department of public prosecutions.⁶³

The room for divergence of opinion as to whether or not there is a reasonable prospect of conviction, as that test is defined in Ontario, is acknowledged in the "Charge Screening: Commentary" published in the Crown Policy Manual. It states:

The recent judgment of the Supreme Court of Canada in Francois v. The Queen, (1994), 31 C.R. (4th) 201 illustrates the point. The charge, which was not "screened out" prior to trial, was based on an historical sexual assault. Essentially the Crown's case relied upon only one witness, a 23 year old complainant who testified about events 10 years earlier. There were a number of problems with her evidence, in particular, her accounts were somewhat inconsistent on some issues and there was some suspicion surrounding the circumstances of her eventual disclosure to the police many years after the assault. However, her account was detailed and she had reasonable explanations for the areas of concern about her credibility. The prosecuting Crown Attorney obviously felt that her evidence was reasonably capable of belief and the jury did believe her. They convicted Francois and the Court of Appeal and a majority of the Supreme Court of Canada (in a 4-3 split decision) concluded that the verdict was "reasonable". The fact that three members of the Supreme Court of Canada felt that the verdict was "unreasonable", and hence, that there was no "reasonable" prospect of conviction, illustrates the point that this is a judgment call and not a precise science. Reasonable people will disagree.

As set out in our interim report dated June 16, 1999, the members of the second Westray prosecution team were not unanimous in their individual views on how to apply the threshold test

⁶³ John L.I. J. Edwards, The Attorney General Politics and the Public Interest (1984), p. 414.

of "reasonable chance of conviction." We concluded that the team generally favoured the use of the 51% rule. Some members of the team argued that in light of the public interest factors, the Crown ought to adopt the *apparently* more stringent test of British Columbia that there be a "substantial likelihood of conviction." In light of the various formulations, reports and academic writings that have commented on the threshold test that should be applied by the Crown, it is hardly surprising that the members of the second prosecution team were uncertain on how to apply the test.

The second prosecution team submitted a lengthy report to the DPP and to the management committee on 'public interest' dated March 24, 1998. This report set out a thorough discussion of the public interest factors to be weighed by the Crown in determining whether or not, assuming that there was a reasonable chance of conviction, the case should proceed to trial. The team asked for direction from the DPP as to the correct approach to apply the threshold criteria "reasonable chance of conviction." In addition, they sought input on the public interest criteria and whether or not the threshold test could be altered by consideration of those criteria. These issues were to be discussed at a management committee meeting scheduled for March 26, 1998.

A meeting was held with the management committee, the DPP, and the Westray prosecution team on March 26, 1998. However, no direction was given by the DPP or the management committee to the team as to the appropriate interpretation of the threshold test nor with respect to the other issues. The reason for the postponement of consideration of these issues was the perceived impact of a communication received from one of the Crown's experts dated March 24, 1998. It was this communication and its implications on the strength of the Crown's case that took up that meeting.

It is of critical importance to the administration of justice, and to the repute of that administration, for the public to be assured that appropriate standards are in place and are being appropriately followed. In light of that importance, we make the following recommendations:

RECOMMENDATION 1.

That the Director of Public Prosecutions and/or the Attorney General formulate a clear statement of principle with respect to the sufficiency of evidence standard to be applied by the Crown.

RECOMMENDATION 2.

That the Director of Public Prosecutions and/or the Attorney General formulate Guidelines with respect to the appropriate application of the sufficiency of evidence test.

The formulation of the appropriate sufficiency of evidence threshold and how it ought to be applied are ultimately matters that must be decided by the Public Prosecution Service and the Attorney General. However, after having reviewed the criteria that are in place in Canada and many other common law jurisdictions, we offer the following comments.

There is considerable uncertainty about the sufficiency of evidence threshold "reasonable chance." We would favour a change to the requirement that there be a "reasonable likelihood" of conviction. This should require that the prosecutor conclude that an objective trier of fact, properly applying the law, ought to convict. Normally such a belief would implicitly require a prosecutor to believe that it was more likely than not that a conviction would occur. However, it must be recognized that there may well be cases where a prosecutor either will have difficulty or cannot say that it is more likely than not that a conviction will result. Proceeding with cases when there is a lesser probability of conviction may still be appropriate where a reasonable trier of fact *ought* to convict or the law is unsettled with respect to the admissibility of evidence. This type of standard adopts one of the most

readily recognized and oft used tests, that is, a certain event is more likely than not to occur.⁶⁴

SECTION III: WORK OF THE SECOND PROSECUTION TEAM - 1995-1998

Background

Proceedings against Messrs. Phillips and Parry and Curragh Inc. first came to trial commencing February 6, 1995, before the Honourable Justice N.R. Anderson. The proceedings did not go smoothly. There were problems with disclosure. The trial judge, rightly or wrongly, became disenchanted with the first prosecution team's general handling of the case, in particular, the conduct and approach of lead counsel, Herman C. Felderhof.

Justice Anderson took the unusual and, with respect, inappropriate step of calling Martin E. Herschorn, Q.C., the then Acting Director of Public Prosecutions. He suggested to Mr. Herschorn that Mr. Felderhof be removed as lead counsel and that G. Arthur Theuerkauf be inserted in his stead. If Mr. Herschorn did not act, he, the trial judge, would take steps to do so himself.

By way of response, the Crown brought a recusal motion which was heard by the trial judge. This motion was dismissed by Justice Anderson on March 14, 1995.

Further issues arose with respect to alleged late or non-disclosure, and an application for

⁶⁴ Some would argue that the "belief rule," that is, that the prosecutor must personally believe that an accused is, in fact, guilty is a valuable addition to any sufficiency of evidence threshold as adding an additional safeguard to protect the presumption of innocence. It is noteworthy that one of the elements in establishing malicious prosecution is the *absence* of an honest and actual belief by the prosecutor in the guilt of the accused *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609 (S.C.C.) at p. 639.

Obviously such a personal belief must never be based on animus or on mere subjective bias. There are many dangers inherent in talking of requiring the personal belief of a prosecutor. If such a belief rule is even to be considered, it must be stressed that the personal belief by a prosecutor that an accused is, in fact, guilty could only be justified on the basis that such a belief is a *necessary* condition but not a *sufficient* one.

particulars. Lawyers from the Department of Justice, representing the Department of Labour, on May 11, 1995, advised the first prosecution team and the defence of the existence of documents and notes not previously disclosed.

Formal notice of an application for a stay of proceedings was given on behalf of the accused on May 10, 1995. The hearing of the application commenced May 23, 1995, and spanned eight days of testimony, concluding on June 1, 1995.

On June 9, 1995, Justice Anderson found that the lack of disclosure or non-disclosure, and the timing of disclosure and the nature of it, amounted to an infringement of the accused's right to make full answer and defence and infringed on their right to a fair trial. Acting under the authority s. 24(1) of the *Canadian Charter of Rights and Freedoms*, Judge Anderson concluded that he was satisfied that the breach was of such a nature that the only remedy which could properly address the prejudice already suffered by the applicants and preserve the integrity of the criminal justice system, was a Stay of Proceedings. In addition, because of the conduct of the Crown "in its broadest sense," he awarded costs in the amount of \$150,000.00 payable by the Crown to the applicant, Gerald Phillips.

Decision to Appeal

The decision by Justice Anderson was a damning indictment of the Public Prosecution Service's handling of the prosecution and a biting criticism of the Crown "in its broadest sense."⁶⁵ The entry of a judicial Stay of Proceedings was, subject to appeal, a final resolution of the proceedings.

A Directive of the Director of Public Prosecutions in respect of appeals by the Crown was

⁶⁵ Although not entirely clear, it is a reasonable inference that Judge Anderson, in referring to the Crown "in its broadest sense," was referring to the conduct of the Department of Justice and other government agencies. He made reference to the concurrent investigations by the Department of Labour, the Westray Commission of Inquiry, and the RCMP with seemingly little effective cooperation amongst them.

developed and issued pursuant to his power under s. 4(e) of the *Public Prosecutions Act*.⁶⁶ The Directive sets out clear principles. The overriding one is that the right of the Attorney General to appeal is to be exercised with "restraint in the public interest." This is what it says:

A. Statement of Principle

1. *The paramount obligation on the Crown in an appeal under Part XXI of the Criminal Code is to present the court of appeal with all the facts and legal authorities the Crown considers relevant to the issues the court must decide.*
2. *The right of the Attorney General to appeal is to be exercised with restraint in the public interest.*

B. Appeal by the Attorney General Against Dismissal

1. *The right of the Attorney General to appeal a dismissal can only be invoked if it is determined that the trial court:*
 - (a) *erred in law,*
 - (b) *erroneously refused or failed to exercise jurisdiction on an indictment, or*
 - (c) *erroneously stayed proceedings on an indictment or erroneously quashed an indictment.*
2. *In addition, the right of the Attorney General to appeal against a judgment or verdict of acquittal can only be invoked if it is determined that the judgment or verdict would not necessarily have been the same if the error in law had not been made.*
3. *In determining whether to launch an appeal in those cases where the right of the Attorney General to appeal can be invoked, the Crown Attorney charged with the responsibility for making the decision whether to appeal shall consider:*

⁶⁶ See Appendix "A", Tab 2 for the full text of the Directive.

- (a) *the seriousness of the error of law made in the proceedings and its importance to the administration of justice;*
- (b) *the potential impact of the decision as a precedent in subsequent prosecutions;*
- (c) *whether the error of law, although not of general application, is determinative of a case that is so important that it is in the public interest that it be appealed;*
- (d) *whether a decision not to appeal might bring the administration of justice into disrepute; and*
- (e) *whether unusual and compelling circumstances exist requiring guidance from the court of appeal.*

The Westray case was certainly considered extraordinary and, as a consequence, extraordinary effort went into consideration of the recommendation for appeal. Kenneth (Butch) Fiske, Q.C., Chief Crown Attorney (Appeals), prepared a detailed memorandum regarding the trial team's recommendation for appeal. He identified four questions that needed to be addressed:

1. Whether there were arguable issues to form the basis for an appeal;
2. Whether there was a reasonable likelihood of success on the appeal;
3. Whether there was a reasonable likelihood of conviction should a new trial be ordered;
4. Whether the Public Prosecution Service was committed to the prosecution of a new trial should one be granted by the Court of Appeal.

He was of the opinion that if the answer was "no" to any of these questions, then there should be no appeal. Mr. Fiske could not come to a definitive conclusion with respect to some of those questions. It is known that the members of the first prosecution team, although shaken by some of the evidentiary rulings, were still of the view that there was a reasonable chance of conviction at trial.

Mr. Fiske did identify arguable issues to be presented on the appeal. He could not answer if the Public Prosecution Service would be firmly committed to proceeding with a new trial, nor could he come to any definitive conclusion on whether there was a reasonable likelihood or expectation of success on the appeal due to the large volume of materials that had yet to be reviewed. The case was simply too lengthy and complex for him to be able at that point, to give a reliable prediction.

Mr. Fiske appropriately underscored issues that the Crown should *not* take into consideration:

As a preliminary comment, and to state the obvious, the Crown should not appeal to look good in the eyes of the public or to be seen to be doing something. The Crown should not appeal to repair reputations, nor should it use the Court of Appeal to avoid what might be considered an unpopular decision but rather to "let the court decide".

Martin E. Herschorn, Q.C. made the decision, on behalf of the Service, that considerations B. 3 (a), (b), (d), and (e) in the Directive regarding appeals, made it appropriate to proceed with an appeal from Justice Anderson's order to stay proceedings. This decision was not only reasonable at the time; it was, in our opinion, correct.

Given the fact that propriety of Crown conduct was in issue, the consensus of opinion was to seek outside counsel to prepare and argue the appeal. Before proceeding with the appeal, the Attorney General was consulted as to the intention of the Public Prosecution Service to initiate an appeal. A call was sent to 17 law firms in the Province requesting proposals from lawyers experienced in criminal law who would be interested in representing the Crown on the appeal.

Craig M. Garson, Q.C., was eventually retained to conduct the appeal. Prior to accepting that retainer, Mr. Garson sought and received assurances that the Crown did indeed have a reasonable likelihood of conviction should a new trial be ordered. In addition, he wanted it understood that as counsel with carriage of the matter, if he found any materials during his preparation of the appeal that cast in doubt the merits of the appeal, he would have the authority to abandon the appeal.

Two members of the original trial team, G. Arthur Theuerkauf and Andrew S. Macdonald, assisted Mr. Garson in assembling the materials for the appeal.

In what was obviously an early date in light of the volume of materials, the appeal was scheduled to be heard November 29, 30, and December 1, 1995.

During the summer of 1995, Mr. Theuerkauf advised the then Acting Director of Public Prosecutions, Mr. Herschorn, that the Crown must be ready to go back to trial. There were many issues uncovered during the first trial that the Crown needed to be prepared to deal with. He suggested to Mr. Herschorn that a new lead counsel⁶⁷ must be appointed along with a new team. He cautioned there were significant amounts of material to be reviewed and that in order to be trial ready by early 1996, they needed to move quickly. He did not want the position of lead counsel.

Jerry Pitzul arrived as the Director of Public Prosecutions on October 10, 1995. He had already familiarized himself with the decision by Justice Anderson and formed the opinion that the stay would be overturned on appeal. He requested Marc C. Chisholm, Q.C. do an assessment of the resourcing requirements to assess and prosecute the case at a new trial. At that point in time, Mr. Chisholm was the Acting Chief Crown Attorney (Trials).

Mr. Chisholm prepared a detailed memorandum dated November 6, 1995, setting out the tasks that needed to be accomplished and the level of staffing required. Relying on input from Messrs.

⁶⁷ Herman C. Felderhof, former lead counsel being on leave.

Theuerkauf and Macdonald, the list of tasks to be performed in relation to documentary evidence *alone* was:

- develop new system for cataloguing
- recatalogue all material previously seized by the RCMP
- distinguish copies from originals
- catalogue 500+ RCMP "administrative" files
- catalogue material from provincial government departments
 - catalogue new material from Inquiry
 - catalogue material from Nova Scotia Department of Natural Resources
 - catalogue material from Department of Labour
 - catalogue material from Department of Environment
 - catalogue material from Department of Justice
 - catalogue material from Department of Economic Renewal
- catalogue "U-Store It" material in Toronto
- catalogue documents given to Inquiry by Federal Government Departments
- catalogue all materials seized by Sheriff from mine site
- request and catalogue material from witnesses (subpoena *duces tecum*)
- review all of the above for relevancy

Mr. Chisholm recommended that there be two full-time secretaries and three data-entry clerks on an initial three month contract and a legal staff of six lawyers.

A case of this nature obviously would require a high level of commitment from any counsel assigned to it. This was recognized by Mr. Chisholm in his memorandum of November 6, 1995:

Personnel

Preparations for and the conduct of a retrial will place enormous demands on the Westray prosecution team. These demands are both professional and personal. I anticipate all members of the Westray prosecution team will put in hundreds of hours of over-time under trying circumstances. The Westray prosecution team will perform their responsibilities under intense public scrutiny due to the significance of the case and the difficulties encountered at the original trial.

It was anticipated that the Crown would be ready for trial by late spring or early summer 1996. This was premised on being able to complete such tasks as accomplishing the collection and cataloguing of all documents, all legal research, reinterviewing all expert witnesses and other key witnesses, and formulation of the theory of the case and the opening and closing addresses. A copy of Mr. Chisholm's memorandum is set out in Appendix "A" at Tab 3.

The hearing of the Crown appeal went ahead as scheduled on November 29, 30, and December 1, 1995. At the conclusion of the hearing, the court did not reserve its decision. It delivered the unanimous decision from the Bench. In essence, the court accepted the Crown's arguments. Hallett J.A. stated:

We are of the opinion the appeal should be allowed for the following reasons: (i) in calling Mr. Herschorn and making the remarks to which we have referred the learned trial judge exhibited an appearance of bias that incurably infects his decision on the stay; (ii) the learned trial judge failed to make an inquiry and a proper determination whether evidence that had not been disclosed or was disclosed late was material to the respondents' ability to make full answer and defence as the trial judge was required to do. (R. v. O'Connor (1994), 89 C.C.C. (3d) 109 (B.C.C.A.)) In fact, the learned trial judge outrightly refused to consider evidence the Crown wished to tender on this issue. Without having decided if the evidence was material, the learned trial judge failed to exercise his power to grant a stay in the judicial manner.

(iii) stays of proceedings are only granted in the clearest of cases. (R. v. Power, [1994] 1 S.C.R. 601; R. v. Burlingham, S.C.C., November 9, 1995)
This was not such a case.

(1995), 146 N.S.R. (2d) 161 at p. 162

In December 1995, the second Westray prosecution team was assembled. The Director of Public Prosecutions agreed with Mr. Chisholm's suggestions that certain incentives be offered to the prospective team members. The team consisted of Marc C. Chisholm, Q.C., Robert C. McCarroll, Robert F. Fetterly, Robert C. Hagell, Andrew S. Macdonald, and G. Arthur Theuerkauf. The new team members had the understanding that they would work on trial preparation for six months. They would then be reassigned to other duties pending the outcome of the anticipated appeal by the accused to the Supreme Court of Canada.

The four new members to the team, Messrs. Chisholm, McCarroll, Fetterly and Hagell, were all senior, experienced litigators. Although Mr. Chisholm was asked by Mr. Pitzul to head up the team, he declined to take on the role of lead counsel. The team was recruited on the basis that Mr. Chisholm would handle administrative details for the team, but that decisions by the team would be by consensus. While it is possible to imagine groups of lawyers who could work together on a consensus basis, in our opinion, in a file as legally and factually complex as the Westray prosecution, there needed to be a lead counsel in order to ensure the overall direction of the team. The decision not to have a lead counsel had a profound impact on the efficiency of the second prosecution effort. In hindsight, although perhaps not unreasonable at the time, it was certainly questionable. We comment on this issue later in our report.

We have interviewed, some at length, all the members of the second Westray prosecution team, Martin Herschorn and Brigadier General (as he now is) Jerry Pitzul. We were initially concerned by the revelation that some members of the team had, even before joining the team, formed negative opinions about the prosecution going forward. In particular, Mr. Chisholm was candid in his views

that initially he was not at all convinced that the prosecution was, in fact, in the public interest. From our discussions with Mr. Chisholm and all members of the prosecution team, his preliminary view was one that did not impact on his ability or dedication to the case.

Robert C. Hagell had expressed on many occasions since 1992 criticism of the police/Crown handling of the prosecution in a variety of respects. Of more significance was his oft espoused views that the Crown could not prove causation and that there were a number of other entities that had responsibility for the disaster other than the accused.

It is clear from our discussions with Brigadier General Pitzul that he was aware of Mr. Hagell's views. He nevertheless wanted him on the team. First of all, he was in the Appeals Branch. If the previous experience taught the PPS anything, it was that they needed to have someone from that branch involved in a prosecution of this size in order to assist not just in legal research up to and during the trial, but also to be able to assess what the Crown position should be with respect to any appeal that may follow a trial. In addition, Brigadier General Pitzul was not prepared to turn a blind eye to any problems in the case. He gave assurances to Mr. Chisholm and to Mr. Hagell that it was within their mandate to arrive at a conclusion that there was not a reasonable likelihood of conviction. They were at liberty to advise him of their opinion. If he was satisfied that they were correct, then indeed the Crown would not proceed to a retrial.

In fact, Robert C. Hagell worked extensively on the issue of causation. By June 13, 1996, he had produced, after multiple drafts, a 50 plus page brief on the causation issue that demonstrated an ability to formulate a convincing argument that the explosion of May 9, 1992, was caused by a multitude of failures by the accused creating the situation where a disaster was waiting to happen.

Work of the Team January 1996 - March 1997

There is no need to set out in detail the work of the team on a daily, weekly, or monthly basis during

this period of time. The action plan of the team dictated that the first order of business was to familiarize themselves with the Crown's case. Previous conceptions about being ready for trial by June 1996 quickly disappeared. They found the file to be disorganized. There was no closing address prepared that could act as a map for the team. There was no comprehensive and cross-referenced exhibit list.

Reports of the expert witnesses were read. One of the first educational meetings was with Andy Liney, P. Eng., in January 1996. Mr. Liney had been hired by the Crown in January 1994 to give expert opinion evidence on ventilation issues. He was in Nova Scotia to appear before the Westray Commission of Inquiry. The team met with him over several days. They were impressed with his knowledge of mining, the running of the Westray mine, and the disaster of May 9, 1992.

One of the tasks that occupied a significant portion of the resources committed to preparing for the retrieval, both in terms of outlay of funds and time and energy by the legal team, was the cataloguing project. This did not get underway until June 1996. At times, there was a staff of nine cataloguers. The project was undertaken by staff from Management Information Services. It was not completed until February 1998.

Given that the project, from the time that the need was identified until it was complete, took 2 years, we had concerns that the failure of the Public Prosecution Service to go to outside private document management companies prevented the Crown from being able to assemble and understand the documentary evidence in their possession in a timely fashion. We consulted with an expert in document management. Given that input, we are satisfied that the decision to use government services did not impede the completion of this work.

There can be little doubt that cases of this size are encountered in civil litigation on a not-infrequent basis. The requirement to produce documents in a civil context is not unlike the Crown's

requirement to disclose.⁶⁸ Assembly of documents should take months, not years. The factors that were at work in preventing the Crown from being able to complete the document management project were:

- they first had to assemble the documents in order for them to be catalogued. This required extensive searches of the Department of Labour, the Department of Justice, the Department of Economic Renewal, etc.
- the state of the documents themselves. Many were smudged, dirty, and of poor quality.
- the Department of Justice asserted claims of privilege over a host of documents. The issue of privilege was not resolved until late fall 1997.

We have earlier alluded to the fact that there was not a lead counsel for the Westray prosecution team. In our opinion, this created a fundamental problem. Although the team had regular meetings with set agendas and minutes kept of those meetings, tasks were assigned but not completed. Legal research on numerous issues was tasked to various members of the team as early as January 1996. Many of these items were not completed until some time in 1998. This is not to suggest that the individual members of the team were derelict in their duty. It was a common theme in our discussions with the team members that they were distracted from completing tasks by new issues and questions arising that they felt needed to be pursued.

The hopes of Brigadier General Pitzul that, over time, a leader would naturally emerge, did not materialize.

With the appeal by the accused still pending before the Supreme Court of Canada, there was no set trial date and hence no fixed deadline. It is not possible to identify just one factor that caused the

⁶⁸ See Nova Scotia Civil Procedure Rule 20.01(1) requiring each party to produce a list and a copy of all documents that are or have been in that party's possession, custody, or control relating to every matter in question.

team to struggle to the point that, in hindsight, the team could be described as dysfunctional. Amongst other things, this was caused by the legal and factual complexities of the file, the duration of the team's work on the file, that there was no lead counsel, and the development of personality conflicts.

It would be fair to say that the individual team members themselves felt frustrated by their lack of progress to be ready to conduct a retrial. One of the means adopted to try to change this course of events was to conduct interviews of witnesses. This had a number of hoped for advantages. At the same time that they would become familiar with the witnesses and be able to assess the strengths or weaknesses of that evidence, it would force them to work toward known deadlines -- the scheduled meetings with witnesses. For the first trial, the Crown witness list was approximately 200 witnesses. At times during the retrial preparation, that list bloomed to 298 witnesses.

Teams of Crown Attorneys traveled to Alberta and British Columbia and met with a number of witnesses. They also familiarized themselves with mining practices by attending the Phalen Colliery in Cape Breton.

Meetings were held with Andy Liney. They also met with Ian Muirhead⁶⁹ in December of 1996. The team was very impressed with his knowledge, impressive credentials, and communication skills. For these reasons he was tentatively scheduled to be the Crown's first witness.

Throughout 1996, the team identified many problems with the state of the Crown's case. Quite apart from the massive undertaking to locate and catalogue all documents in the possession of the "Crown," it became acutely aware of the problems with many of the statements that had been taken from witnesses. Concerns were identified about a number of things, including the calibration of

⁶⁹ Mr. Muirhead was a professor of mining at the University of Alberta and an eminent mining consultant. He had been retained by the insurers of the Westray Mine and had provided a series of reports to them following the explosion of May 9, 1992. He had been contacted by the first prosecution team and had agreed to act as an expert witness.

measuring equipment used in the Westray mine (which could impact on the ability of experts to offer opinions based on sound factual premise); the validity of the post-explosion coal dust sampling; the admissibility of evidence seized pursuant to search warrants; whether the experts could reliably say that there was a coal dust explosion, and the need to engage an expert on whether or not the coal dust samples constituted representative samples.

In early 1997, a general 'to-do' list was prepared. It was by no means complete, yet it occupied six pages. Members of the team recognized that there were differences in the opinions of the experts. It was concluded that there was a need to have all the experts in possession of the same fact base. The issue of having a joint meeting with the experts was raised.

In December 1996 the team forwarded to Andy Liney a complete transcript of the testimony at the Westray Commission of Inquiry. In late February 1997 they received his report. Overall, it was a damning indictment of virtually everyone who had testified at the Inquiry. He made allegations that witnesses colluded, committed perjury, or were otherwise unreliable. The report plainly caused the Westray team to have concerns over using Mr. Liney as a witness. They debated for a short time whether or not they had to disclose Mr. Liney's report on the Inquiry testimony. They decided they would indeed disclose it.

March 23, 1997 - March 30, 1998

This period of time was an extremely important one in understanding the eventual recommendation of the Westray prosecution team to discontinue the prosecution. For this reason, more detail is appropriate on the developments during this time.

On March 23, 1997, the Supreme Court of Canada released its decision on the appeal by the accused. The appeal had sought to overturn the decision of the Nova Scotia Court of Appeal directing a new trial. The appeal was heard on November 26, 1996. The defendants argued that the

Nova Scotia Court of Appeal had ignored the concerns about the integrity of the criminal justice system that had been expressed by Justice Anderson. The Crown dealt at length with the allegations of late and non-disclosure in its Factum, though not in its oral argument. The Crown, in its oral presentation, chose to focus on the issue of reasonable apprehension of bias by the trial judge, if not actual bias. The position taken by Crown counsel before the Supreme Court of Canada, represented by Craig M. Garson, Q.C., was a sound decision based on principles of advocacy. Unfortunately it had unforeseen consequences.

The Supreme Court of Canada, by a majority of 7 to 2, dismissed the appeals by the accused and upheld the order for a new trial.⁷⁰ The majority found that although the Crown's allegation that the actions and words of the trial judge revealed actual bias may well be correct, it was not necessary to consider the issue as it was clear the actions and words of the trial judge certainly revealed a reasonable apprehension of bias. LaForest and Cory JJ. wrote that the trial judge had interfered with the Crown's conduct of the case and so became inappropriately involved in the fray. They went on to conclude that the order of the trial judge staying the charges was void; that due to the reasonable apprehension of bias the trial judge had no further jurisdiction in the proceedings, and that there was no alternative other than a new trial.

The majority were careful to refrain from making conclusions about the issues or facts that would face the judge at the new trial:

[12] It is important that a new trial be held, and as a result as little as possible should be said regarding the issues that may arise or the evidence. Like our colleagues Justices McLachlin and Major, we have carefully considered the facts. We refrain from commenting upon them. We do this so that the judge presiding at the new trial is not inhibited in any way in dealing with any of the issues that may arise. Particularly the trial judge should not be inhibited either by our colleagues' view of the evidence and issues or ours, which could well be different. At the new trial, both the Crown and the

⁷⁰ The majority judgment was written by La Forest and Cory JJ. Sopinka J. wrote a separate judgment concurring in the result. The dissenting judgment was written by Major and McLachlin JJ.

defence can take whatever steps and raise whatever issues they consider appropriate. The trial of these accused like all who face criminal charges should be fair and be perceived to be fair. To achieve this goal the issues raised at the new trial and the facts upon which they rest must be determined by a judge who is not only impartial but is seen by all to be impartial. This is clearly in the best interests of the accused and the community.

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In an unusual move, the majority of the Supreme Court of Canada ordered that the costs of the appellants, to date, be paid by the province, and the reasonable legal costs to be incurred in the new trial as well. It is important to stress that this award of costs was not directed against the Crown for any perceived misconduct by it, but arose out of systemic problems that were beyond the control of the appellants. In particular, the prejudice that was caused by the words and actions of the trial judge. LaForest and Cory JJ. wrote:

[13] It only remains to resolve the issue as to costs. The proceedings in the first trial were complex and lengthy. The new trial will be equally difficult. The appellants have suffered and will continue to suffer from the grievous financial burden of legal costs. Ordinarily this is something which must be accepted by those charged with criminal offences. Yet, in this case the delays and much of the legal costs incurred arise from systemic problems that were beyond the control of the appellants. They were to a large extent occasioned by the words and actions of the trial judge which gave rise to an apprehension of bias. This was followed by his refusal to grant the motion for recusal. In this unique circumstances the appellants should recover their reasonable legal costs of the proceedings to date. As well they should be paid the reasonable legal costs incurred in the new trial for which they cannot in any way be held responsible.

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McLachlin and Major JJ. wrote a lengthy dissenting judgment. They started with the premise that the history of the proceedings against the two accused "creates the impression of a prosecution seemingly prepared to obtain a conviction at all costs." They then set out what they referred to as a

detailed examination of the facts.⁷¹

It is not necessary at this juncture to examine the validity of the factual underpinnings set out in the written reasons of the dissenting justices. It is important, however, to state that the allegations of late and non-disclosure and Crown misconduct were fully aired before the Nova Scotia Court of Appeal in a hearing that lasted close to 3 days. No such review took place in the hearing before the Supreme Court of Canada. The Crown properly focused the attention of the court on the real issues before the Supreme Court of Canada: (1) did the Nova Scotia Court of Appeal err in its conclusions that the trial judge displayed a reasonable apprehension of bias and therefore ought to have recused himself; and (2) did the Nova Scotia Court of Appeal err in its assessment that there had been no violation of the accused's rights under s. 7 of the *Canadian Charter of Rights and Freedoms*.

From our examination of the available materials, we have, with respect, concerns about the correctness of the assertions made in the dissent in the Supreme Court of Canada. For now it is important to set out the conclusion of the dissenting opinion that later had a profound impact:

[121] The present case is not simply about Crown non-disclosure. This case is about the appearance of justice. Throughout the proceedings the Crown bent and broke rules, and attempted to cover up when it was caught. The Crown actively misled the court, on a number of occasions. The Crown ignored or failed to obey court orders. It is unnecessary to repeat the litany of abuses that have already been described. The entire proceedings were tainted by prosecutors who were playing to an enraged public, and playing to win. That this is apparent can be seen from the internal memo that passed between prosecutors referred to by the trial judge and in these reasons. To win is not the role of the prosecutor, to win at all costs is an affront to the Canadian justice system. Courts should not tolerate activities which demonstrate this attitude. The conduct of Crown counsel at the trial violates the fundamental principles that underlie the community's sense of fair play and decency and

⁷¹ p. 489.

constitutes an abuse of the court's process.

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On March 27, 1997, the Director of Public Prosecutions, Jerry Pitzul, requested from the Westray prosecution team:

- 1) *the Prosecution Team's opinion on whether or not there is a reasonable likelihood of conviction in this case and whether or not it is in the public interest to proceed to the new trial;*
- 2) *the Prosecution Team's opinion on whether or not the Crown can meet its obligation to disclose taking into consideration but not limiting itself to the issues raised at the first trial, progress since the first trial, the position taken by the Crown before the Nova Scotia Court of Appeal, the position taken before the Supreme Court of Canada, and the decisions of the Nova Scotia Court of Appeal and Supreme Court of Canada (including the dissent);*
- 3) *the opinion of the prosecution team on the impact of the comments of the dissenting judges of the Supreme Court of Canada in respect of the Crown's conduct in this case on the Crown's ability to conduct a second trial;*
- 4) *the Prosecution Team's opinion on how best to approach any prospective application by the defence for a stay of proceedings; and*
- 5) *a status report on the Team's trial readiness.*

Mr. Pitzul's request was further refined due to the filing of a complaint by Gerald Phillips with the Nova Scotia Barristers' Society on March 27, 1997, against John Pearson, Martin Herschorn, Herman C. Felderhof, Peter Rosinski, G. Arthur Theuerkauf, and Andrew S. Macdonald. This development necessitated input from the team as to the impact on the composition of the Westray prosecution team.

Although there was no time frame set on providing these reports, it was anticipated by Mr. Pitzul that he would receive them within weeks, not months. At the time of requesting these reports, Mr. Pitzul was surprised to learn that there had not been a breakdown of the elements of the offence and the evidence that the Crown had at its disposal to prove them. In our opinion, Mr. Pitzul was right to be surprised.

Some members of the prosecution team viewed the requirements of completion of these reports as distracting the team from necessary trial preparation. Others viewed it as a useful exercise to cause them to focus on determining what it was they had to prove, the evidence they had at their disposal, and developing an overall theory of the case. The latter view, in our opinion, is undoubtedly correct. Nevertheless, it is obvious that considerable expenditure of time went into preparing the various reports. In some cases, dozens of drafts were prepared before the report ended up in its final version. The reports and their dates of completion are set out in the table below:

<i>TITLE</i>	<i>DATE</i>
Trial Readiness - Report #5	May 26, 1997
Anticipated Stay of Proceedings Motion - Report #4	June 25, 1997
Appropriate Composition of the Prosecution Team - Report #3	September 9, 1997
Meeting the Crown's Disposal Obligation - Report #2	September 9, 1997
Reasonable Likelihood of Conviction - Report #1	Interim Report February 9, 1998
	Final Report June 22, 1998
Public Interest - Report #1	March 24, 1998

For purposes of explaining why the Crown discontinued the Westray prosecution, we must focus on the assessments done by the prosecution team as to whether or not there was a reasonable likelihood of conviction.⁷² On the other hand, the other reports done by the prosecution team and the work they were doing from March 1997 until the termination of the prosecution, are important in understanding why it took so long for the team to come to its ultimate conclusion that there was not a reasonable likelihood of conviction should the charges proceed to trial.

Trial Readiness - Report # 5

The first report completed by the Westray prosecution team was the one on "Trial Readiness" dated May 26, 1997. It is a 13-page analysis of the tasks that needed to be accomplished and the time to do them. It took almost two months to complete. It is a startling document. It identified 280 witness interviews yet to be carried out and a list of matters requiring follow-up investigation. It identified the recent seizure of over 14,000 documents from the public inquiry which had not yet been catalogued or reviewed. In addition, there was a host of other material identified as necessary to fulfill the Crown's disclosure obligation. Of the various tasks identified, the time to conclude them, involving all six lawyers, came to just in excess of 22 months. The report identified the fact that if any members of the team were not available to fully participate, such as G. Arthur Theuerkauf and Andrew S. Macdonald,⁷³ who had substantial file knowledge, then they had to be replaced by other Crown Attorneys and preparation time would be substantially increased as a result. The reasons given by the report as to why they would not be trial ready by September 1997 were:

⁷² Although the official Directive of the Director of Public Prosecution refers to the sufficiency test as being "reasonable chance" most times, throughout the involvement of the Westray prosecution team and in general in the Public Prosecution Service, the test is usually referred to as reasonable likelihood. In our opinion, nothing turns on the difference in terminology in the absence of guidelines from the Attorney General or the DPP as to how to apply the sufficiency test.

⁷³ Concerns had been raised about their ability to participate fully due to the implications of the complaint to the Nova Scotia Barristers' Society by Gerald Phillips.

- (i) *There are a large number of documents and witnesses. This requires time in reading and analyzing the material. Also, the need to correlate documentary evidence with witnesses and the testimony of each witness with other witnesses is an extremely time-consuming process;*
- (ii) *The technical nature of the facts. The facts of this case centre around underground coal mining, ventilation, treatment of coal dust, use of equipment, and training. As a result, we are dealing with engineering and coal mining concepts that are foreign to the layman and very technical and detailed;*
- (iv)[sic]*The law of disclosure has changed considerably over the last five years. This requires our being thorough in locating and disclosing all relevant, or possibly relevant, witnesses, documents, and exhibits.*

p. 11-12

The team recommended that an additional lawyer, a paralegal, and a secretary be added to the team as soon as possible. If Messrs. Theuerkauf, Macdonald, and Chisholm, became less than full participating members, an additional four lawyers, two paralegals, and two secretaries would need to be added to the team. In the event that Messrs. Chisholm, Theuerkauf, or Macdonald were not permitted to participate at all, then an assessment would have to be made as to whether the team could even continue.

Stay of Proceedings - Report #4

The next report that was completed was Report #4 on the anticipated 'Stay of Proceedings Motion.'

This report was submitted to Mr. Pitzul on June 25, 1997. The need for the report was obvious. The first trial had ended in a judicially ordered stay of proceedings based on allegations of violations of *Charter* rights and a remedy of a stay under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The Crown had been successful in refuting these allegations before the

Nova Scotia Court of Appeal. The order for a new trial was upheld by the Supreme Court of Canada. However, the Supreme Court of Canada clearly left open to the accused to bring a new application for a stay of proceedings before or during the new trial. In addition, comments had been attributed to at least one of the accused that an application or applications would be brought for a stay of the proceedings.

It appeared obvious that the stay of proceedings application would involve lengthy proceedings. Many of the former, and current, members of the Westray prosecution team would likely be witnesses. In addition to the ethical difficulties surrounding such a dilemma, there were also logistical ones. The Report recommended that, to ensure objectivity, outside counsel be engaged to defend the anticipated application.

Disclosure - Report #2

The reports on Disclosure (Report #2) and on Composition of the Prosecution Team (Report #3B)⁷⁴ were submitted on September 8, 1997.

The Report on Disclosure detailed some of the known disclosure problems that had occurred, outstanding disclosure requests that had not yet been complied with, and the plan to continue the Crown's work in completing a review of materials that had been seized by the RCMP, determining its relevance, photocopying it and producing it to the defence.

The conclusion of the team was that if the trial did not commence until the fall of 1998, disclosure could be provided to the defence in a sufficiently timely fashion to enable the defence to proceed with the trial as scheduled. The team believed that the Crown was capable of complying with the

⁷⁴ Report #3 was broken into two parts. Report 3A was to deal with the defence allegations of inadequate disclosure or Crown misconduct and the Crown's position on those allegations. This report was not completed due to the priorities set on the other reports and at least partly due to the engagement of outside counsel to defend the anticipated stay of proceedings.

disclosure obligation in the Westray prosecution, but cautioned that there would be ongoing disclosure and a significant amount of work was yet to be done to complete the process.

Team Composition - Report #3B

A Report on the Composition of the Prosecution Team was generated by two events. The first was the censorious comments in the dissenting judgment of the Supreme Court of Canada. This was followed within two weeks by Gerald Phillips lodging a complaint with the Nova Scotia Barristers' Society against all members of the original Westray prosecution team, plus Martin Herschorn and John Pearson. Mr. Theuerkauf and Mr. Macdonald retained counsel in response to the complaint to the Nova Scotia Barristers' Society. After consultation with their counsel, both Mr. Theuerkauf and Mr. Macdonald were prepared to continue to serve on the Westray prosecution team. This Report made recommendations to the Director of Public Prosecutions as to whether or not Mr. Theuerkauf and Mr. Macdonald should continue to serve and, if so, in what capacity. The Report was prepared without input from Mr. Theuerkauf or Mr. Macdonald.

The Report assured the Director of Public Prosecutions that Mr. Macdonald and Mr. Theuerkauf had, since the second team had commenced its work in December 1995, conducted themselves in a responsible and professional manner. They recognized that they did not have the time and hence did not conduct a review into the criticisms set out in the dissent of the Supreme Court of Canada.

The team concluded that there was no sufficient reason to justify Mr. Theuerkauf or Mr. Macdonald from leaving the team, but recognized that their participation could create a *perception* that they were in a conflict of interest in making prosecutorial decisions while there was an outstanding complaint by Mr. Phillips with the Nova Scotia Barristers' Society. The Report recommended that Messrs. Theuerkauf and Macdonald continue to serve as members of the prosecution team but not participate in any decision for which it could be perceived that they were in a conflict of interest.

Report #1 - Reasonable Likelihood of Conviction and Public Interest

Report #1 was obviously the crucial document, for it goes to the root of the decision to continue or terminate the prosecution. As noted in all of the authorities that are written on the subject, and in most of the official government policies, the wrong decision can have disastrous consequences. Indeed, the Directive of the Public Prosecutions dated June 19, 1992, states, in part:

The decision whether or not to continue a prosecution is one of the most important steps in the prosecution process. In every case great care must be taken in the interests of the community and the accused to ensure that the right decision is made. A wrong decision to continue a prosecution or wrong decision to terminate a prosecution, both tend to undermine the confidence of the community in the justice system.

The request by the Director of Public Prosecutions for Report #1 identified two issues to be addressed. The first was whether or not there is a reasonable likelihood of conviction. The second was whether or not it was in the public interest to proceed with the new trial. As noted earlier, in setting out the legal framework and basis for the existence of the Attorney General's discretion on every prosecution, it is well recognized that the first step in determining how the discretion ought to be exercised is to make a conclusion as to whether or not there is sufficient evidence to proceed to trial.⁷⁵ We learned from interviews with members of the prosecution team and from Brigadier General Pitzul, that the initial deadline for the recommendation from the prosecution team on this

⁷⁵ The most common expression of the underlying philosophy of how the discretion ought to be exercised is the pronouncement by Sir Hartley Shawcross: "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be subject to prosecution. Indeed the very first regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute... whenever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration." This statement of principle was accepted by John L.I. J. Edwards as being the underlying theory of criminal prosecution to be adopted not only by the Attorney General, but by police themselves in the exercise of their discretion (The Attorney General, Politics in the Public Interest, p. 404). Indeed, the emphasis on public interest can be seen by the reference to this statement of principle in the Marshall Inquiry (adopted in Nova Scotia by the Government Response to the Recommendations, February 7, 1990). It is also specifically adopted by the Federal Department of Justice, Alberta Department of Justice, Saskatchewan Department of Justice, Manitoba Department of Justice, New Brunswick Department of Attorney General.

Report was May 1, 1997. It appears that various drafts were done on the issue of public interest, but nothing was committed in writing with respect to reasonable likelihood of conviction until the team issued an interim report on February 9, 1998.

Attempts were made by the DPP to set a deadline of mid-June 1997 for the Report on Likelihood of Conviction. From examining the work product of the various members of the prosecution team, they set about formally defining the elements of the allegations and assembling the evidence on those elements. Some members of the team argued, for various reasons, that the Crown ought to adopt the sufficiency of evidence test as requiring a "substantial likelihood of conviction." The issue was not resolved.

As noted in an earlier section of this report, the charges against the accused were broken down into two broad divisions. One was the unlawful act manslaughter charges based on the allegation that the accused failed to systematically clear coal dust or take steps to prevent explosions of coal dust occurring. The second was that the accused showed wanton or reckless disregard in how they ran the mine. There were seven categories or particulars dictating what aspects of their conduct were said to demonstrate such conduct. These included the same allegations in relation to coal dust. The other main allegation was in relation to failing to ensure that the main and auxiliary ventilation in the mine was adequate.

Throughout June and July 1997 various deadlines were set to complete the tasks necessary to offer an opinion on the issue of reasonable likelihood of conviction. As this work progressed, problems were identified and discussed. It is safe to say that these were not new problems. They had earlier been identified but not resolved.

A new deadline of September 5, 1997, was set for completion of the report on reasonable likelihood of conviction and public interest. By August 22, 1997, the team reported orally to the Director of

Public Prosecutions. Some of the team members were not prepared to express an opinion as to whether there was or was not a reasonable likelihood of conviction. In particular, Robert C. Hagell felt there was much more to do and that he had not yet read the entire file. It appears that Robert F. Fetterly was of the opinion that there was a reasonable likelihood of conviction in relation to the coal dust allegations. Robert C. McCarroll was not prepared to say that there was a reasonable likelihood of conviction due to the many things still up in the air for the team to resolve. Marc C. Chisholm, Q.C., was of the view that they still needed to refine the issues on the ventilation and coal dust cases, in particular as to whether or not they could prove that there was a methane layer from the abandoned gob (SW 1 panel) up to the working area of SW 2. He was generally more comfortable with the ventilation case having a reasonable likelihood of conviction.

Not only were the members of the team being pressed by the Director of Public Prosecutions, but also by the fact there were pretrial conferences being held. The team was understandably and appropriately concerned that they not make any communication to the defence and to the court that would mislead or misrepresent the Crown's state of readiness to proceed with the new trial.

The first time there was anything committed in writing on the issue of reasonable likelihood of conviction was a memorandum prepared by Mr. Hagell, Senior Crown Attorney, dated October 29, 1997, to the Westray Prosecutions Groups re: Westray - Likelihood of Conviction, and his letter, also dated October 29, 1997, to the then Director of Public Prosecutions, Jerry Pitzul.

There are a number of reasons that make it important, in our opinion, to review at least briefly these documents. First, is that these had a profound impact on the ability of the Public Prosecution Service to effectively continue with this prosecution. Second, the material has already been made public and an objective assessment of the validity of some of Mr. Hagell's views should be made. Last, some of Mr. Hagell's opinions had merit and can highlight our own recommendations on how to best to avoid a situation where the Public Prosecution Service is involved in prosecuting a

case through all levels of courts for over 6 years, only to then terminate the prosecution.

Memorandum to Westray Prosecution Group from R. Hagell dated October 29, 1997

The memorandum of October 29, 1997, is lengthy. It is addressed to the Westray Prosecution Group on the issue of likelihood of conviction. It is important to emphasize that Mr. Hagell did not come to the conclusion that there was not a reasonable likelihood of conviction. He concluded that the team was not in a position to offer an opinion as to whether there was or was not a reasonable likelihood of conviction. He identified six reasons why they were not in a position to offer an opinion. He then set out why he believed the Crown would never be in a position to be able to definitely say that there was a reasonable likelihood of conviction. In our opinion, there are a number of serious factual and legal errors in the memorandum. There is no need to go through it in detail. A few examples will suffice.

Mr. Hagell wrote:

The present prosecution group have not had an opportunity to review Search Warrants and continuity of exhibit issues. Issues of continuity of documents and the authority in which they were seized, or taken, are crucial matters in relation to assessing the likelihood of conviction.⁷⁶

It had been recognized by the prosecution team for some time that many of the search warrants used to seize exhibits from the Westray mine property were subject to attack based on some deficiencies in the Information sworn to obtain them. Assuming that either of the accused even had

⁷⁶ p. 2.

standing to challenge any of the search warrants,⁷⁷ in order for a warrant to be found invalid, the accused must convince the trial judge that the Justice of the Peace could not, acting judicially, have been satisfied that there existed reasonable grounds for the Informant to believe that the things sought were in the location to be searched at the time the warrant was to be executed and that the items would afford evidence of an offence. Even if a warrant is found to be invalid, the accused must then satisfy the trial judge that to admit the evidence could bring the administration of justice into disrepute. When the things sought to be excluded are categorized as real evidence⁷⁸ (or to use the more current label "non-conscriptive evidence"),⁷⁹ the onus, which is on the accused, will be exceedingly difficult.

Continuity of exhibits need not be proved as a matter of law. It is done as a matter of practice. Failure to establish continuity goes to weight and not to admissibility. From our review of the file there is no doubt that it would be an arduous task, and in some cases likely impossible, to establish continuity of some of the exhibits. However, the Crown could establish continuity of the more important exhibits. Even though it is appropriate for the prosecution to take into account the likely weight that a trier of fact will give to certain evidence in assessing the sufficiency of evidence criteria, we fail to see any basis to conclude that questions as to continuity were so profound as to call into doubt the likelihood of conviction.

It would be *unreasonable*, in our opinion, for the Crown to have viewed either the problems with search and seizure issues or of continuity proof as sufficient cause of why the prosecution should be terminated.

⁷⁷ The basis of any attack on a search and seizure must either come through a pretrial application to quash the warrant which must be based on a proprietary interest in the articles (*R. v. Zevallos* (1997), 37 C.C.C. (3d) 79 (Ont. C.A.) or at trial on the basis of an alleged violation of the guarantee against unreasonable search and seizure set out in s. 8 of the *Canadian Charter of Rights and Freedoms*, which in turn is based on the protection of privacy principle. Only those who have a legitimate privacy interest will have standing to challenge the validity of a search (see *R. v. Edwards* (1996), 104 C.C.C. 136 (S.C.C.)).

⁷⁸ *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.)

⁷⁹ *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.)

Mr. Hagell went on to state another of the reasons which caused him to conclude that it would not be possible to say that there was a reasonable likelihood of conviction:

Third, we are dealing with a circumstantial case. All of the eye witnesses died in the explosion. It is therefore necessary to eliminate all causes of the explosion which do not relate to the accused persons. These causes must be eliminated beyond a reasonable doubt.⁸⁰

In our opinion, it is a fundamental flaw to state that all causes of the explosion, other than the acts or omissions of the accused, must be eliminated beyond a reasonable doubt. The only things that the Crown need prove beyond a reasonable doubt are the elements of the offence. To do so on the facts of this case, the Crown needed to lead expert opinion evidence. Those experts will no doubt rely on the existence of certain facts. In order for the opinion evidence to be admissible, there must be some evidence to establish the facts on which the expert relies. The factual underpinnings for the expert opinion evidence in this case ranged from the very general to the specific. A partial list would include the need to lead evidence as to the geology of the area, the development and lay-out of the mine, the gas readings, the colour of the dust in the mine, the amount of stone dust at the mine site and the availability of equipment to spread it, the experience and training of the accused and of the mine personnel, the condition of the mine after the explosion, the condition and location of equipment, including the location and the internal and external state of the men who lost their lives.

Once a proper fact base is established by the evidence, the experts can then give their opinion as to what happened. Criminal liability could attach to the accused if a trier of fact accepted a) expert opinion evidence that a methane layer ignited, and a sufficient quantity of methane became mixed in the general atmosphere of at least an area of the mine which then exploded, causing the deaths of one or more of the miners; b) the deaths resulted from the initial methane ignition, the subsequent

⁸⁰ Memorandum to Westray Prosecution Group, October 29, 1997, p. 5.

explosion of methane, or a coal dust explosion triggered by a methane explosion; and c) that the acts or omissions of either of the two accused showed wanton or reckless disregard for the lives or safety of the miners and that such conduct was a contributing cause, outside the inconsequential, of the deaths of one or more of the men.

Criminal liability could also be established if the Crown proved beyond a reasonable doubt that one or both of the accused violated the *Coal Mines Regulation Act* with respect to coal dust and that this unlawful act caused the deaths of one or more of the miners in the sense of being a contributing cause outside the inconsequential.

In our opinion, to say that the Crown need eliminate all causes external to the accused, would impose an impossible burden on the Crown. It is also a burden not required by law.

If there are other operative causes, it can certainly impact on the issue as to whether or not it is fair to single out one or more accused where there are others who may be equally at fault. The acts or omissions of government officials, including the Department of Labour inspectorate, clearly bothered Mr. Hagell and other members of the Westray prosecution team. In addition, it appears that doubt began to creep into their minds that the standards and conditions at the Westray Mine, although significantly below sound principles of safety, were not much different than other mines. Considerations such as these should be dealt with in determining whether or not it is in the public interest to proceed.¹¹

A further particular of the reasons articulated by Mr. Hagell that he said made it impossible to conclude that there was a reasonable likelihood of conviction was:

¹¹ Although it is certainly conceivable that conditions at other mines and the apparent approval of at least some of the questionable standards or practices at the Westray mine by the Department of Labour, could impact on likelihood of conviction on the basis of relevance to what a reasonable mine manager would or ought to do.

Fifth, the evidence, is open to an extremely wide range of interpretation. The evidence can be seen as very damaging to Mr. Phillips and Mr. Parry. Their actions and inactions can be seen not only as criminally negligent, but criminally negligent in the extreme. The other interpretation one can arrive at, is that Mr. Phillips and Mr. Parry were trying their best but did not have the education, training, or personalities to properly manage a coal mine. In any situation where there are possible different interpretations of the evidence, the benefit of doubt will go to the accused."

(emphasis added)

Leaving aside the fact that the Crown had in its possession a substantial body of evidence that both of the accused did indeed subjectively know through their education, training, and experience in other mines the extreme dangers associated with methane and coal dust, the fact is that the law

imposes an *objective* standard. While it can be said that the law is still somewhat uncertain because the Supreme Court of Canada has not yet definitively ruled on this issue, there is absolutely no basis for the Crown to take the view that the subjective belief or attitudes of either Mr. Phillips or Mr. Parry would in any way prevent the affixing of criminal liability. As noted in an earlier section of this report, with respect to the theoretical framework, all available case law, including analogous cases dealt with by the Supreme Court of Canada, point to an objective standard."⁸²

Mr. Hagell also stated:

Tenth, in relation to the mental element of criminal negligence causing death, it is my view that the Supreme Court of Canada will require some blameworthy state of mine. Establishing beyond a reasonable doubt a guilty state of mind in this case will be impossible."

⁸² *Ibid.* p. 6

⁸³ Modified perhaps only by evidence that demonstrate that the accused did not have the *capacity* to meet the standard of a reasonable person.

⁸⁴ Memorandum to Westray Prosecution Group, October 29, 1997, p. 6.

For the reasons noted above, in our opinion, it was unreasonable for Mr. Hagell to conclude that the Crown faced an impossible task of proving beyond a reasonable doubt a "guilty state of mind."

The memorandum of October 29, 1997, by Mr. Hagell did legitimately highlight the complexities of the case and some of the inherent difficulties facing the Crown. He noted that most allegations of criminal negligence or manslaughter deal with the fact situation covering one incident. In this case, they were dealing with events that took place over at least a 9 month period. There was a complex interrelationship between the accused, other mine personnel, and the Department of Labour.

Although mining can be viewed as a very crude and simplistic undertaking, in reality it is a highly technical undertaking. The initial investigation by the Department of Labour and/or RCMP resulted in statements that were not detailed and subject to some serious flaws. There was no detailed forensic examination of the mine that is usually attendant following any mine disaster.⁴⁵

On the issue that the standard of care of the accused fell below that of a reasonable mine manager, the Crown naturally intended to compare their conduct to the standards set out in the *Coal Mines Regulation Act*. There are various sections in that Act that are not only poorly drafted but create an interrelationship between mine management and the government inspectors. For example, s. 71(1) of the *Coal Mines Regulation Act* provided:

Air Supply

71 (1) Every mine while being worked shall be thoroughly ventilated and furnished with an adequate supply of pure air to dilute and render harmless inflammable and noxious gases to such an extent that all underground places, except places sealed or properly fenced off according to law, shall be in a safe

⁴⁵ It was hoped at one point that ventilation could be reestablished in the mine and bare faced forensic examination properly undertaken. This was not done due to the general inaccessibility of the north mains and to the hazardous conditions. All hopes of carrying out that forensic examination were prevented by the flooding of the north mains, an event that a number of experts later stated was quite unnecessary.

One of the experts for the Inquiry, Reginald Brookes, was highly qualified in the investigation of mine explosions, compared other investigations with scientific teams spending 14 days underground carrying out a detailed examination versus his time underground at Westray of 2 hours. (Inquiry Transcript, November 23, 1995, p. 197).

and healthy condition for the persons passing and working therein.

Inadequate supply of pure air is defined as meaning "such volume of air circulating in a mine and the working places thereof as may be deemed necessary by the deputy inspector" (s. 71(2)). The evidence available would demonstrate that the inspectors from the Department of Labour did not give any direction to the mine management. It therefore becomes problematic for the Crown to argue that there was an inadequate supply of "pure air." This problem was particularly relevant in relation to the suggestion that having the ventilation circuit run by the old gob (SW 1 panel), fell below industry standards and was in violation of the ventilation dictates of the *Coal Mines Regulation Act*. Subsections 71(7), (8), and (9) also contain provisions in which inspectors have an approval or supervisory role with respect to auxiliary ventilation.

Mr. Hagell's companion letter of October 29, 1997, to Mr. Pitzul, dealt with the issue of public interest. Mr. Hagell set out his opinion that he could not say there was at the present time a reasonable likelihood of conviction, that it would not be possible to be in a position to conclude that there was and that the prosecution was beyond the capability of the prosecution service due to the number of witnesses, documents, and the complexity of the case. He concluded that it would be unethical for him to work on the file and he therefore requested a transfer back to the Appeals Branch of the Public Prosecution Service. He strongly urged that the Director of Public Prosecutions and the other Crown Attorneys on the team bring the prosecution to an end.

The remaining members of the Westray prosecution team did not accept Mr. Hagell's overall opinion. While acknowledging some of the difficulties identified by Mr. Hagell, they were unanimously of the view that it was premature to conclude that the Crown did not have a reasonable likelihood of conviction or that it was otherwise not in the public interest to proceed with the prosecution. Mr. Pitzul also did not accept the opinion or recommendation of Mr. Hagell. He did accede to his request to be reassigned. No other member of the team felt that it was beyond their capability to determine whether or not there was a reasonable likelihood of conviction and if there

was, the Service's abilities to prosecute the case.

Impact of Mr. Hagell's Departure

It is not possible to say that there is a direct link between Mr. Hagell's memorandum of October 29, 1997, his subsequent departure from the team, and the ultimate recommendation by the team to discontinue the prosecution. That is not to say there was no impact. In our opinion, Mr. Hagell's memorandum of October 29, 1997, and letter of that same date to Mr. Pitzul, had a devastating impact on the team.

The content of the memorandum itself was not unexpected. Not only had Mr. Hagell been voicing these types of opinions since some time in September 1997, he had actually circulated a draft of what was essentially the same memorandum on October 1, 1997. Shortly after Mr. Hagell's memorandum was officially circulated, Andrew S. Macdonald asked to be reassigned to get more courtroom experience. Morale was at an all-time low. The team was reduced to four functioning Crown Attorneys, and of those, G. Arthur Theuerkauf was, according to Report #3, not to be involved in any decisions in which there could be a perceived conflict of interest.

Marc C. Chisholm, Q.C. wrote to the Director of Public Prosecutions on November 7, 1997, identifying the earliest date that he and his colleagues would be able to provide an opinion on the issues of likelihood of conviction and public interest to be January 15, 1998. He identified a list of tasks that had to be undertaken. The letter and schedule is in Appendix "A", Tab 4. This deadline was extended to January 20, 1998, due to the scheduling of witness interviews, and there was a further extension to February 6, 1998, to complete a revised schedule of tasks. This is noted in a letter dated January 21, 1998, from Mr. Chisholm to Mr. Pitzul and a copy of this is in Appendix "A", Tab 5.

It had long been recognized that the case was heavily dependent on expert opinion evidence. The Westray prosecution team had always been aware that there was some divergence of opinion among their experts. Indeed, there was an attempt by the first Westray prosecution team to carry out an analysis or rationalization of the experts' opinions.

Expert opinion evidence in the Westray prosecution was not only necessary to educate any trier of fact on the technical aspects of coal mining, but also on the more fundamental issues of the standards of a reasonable mine manager with respect to the intricacies of ventilation, coal dust and the safe operation of a mine. An important question for the experts would be whether or not the acts or omissions of either of the two accused demonstrated a wanton or reckless disregard for the lives or safety of the men, or constituted a violation of s. 70(1) of the *Coal Mines Regulation Act* and that such conduct was a contributing cause outside the inconsequential to either the ignition or propagation of an explosion causing the deaths of one or more of the 26 miners.

It is our experience that it is rare indeed for any two experts in a field to agree on all matters in any given case. For the first trial effort, the RCMP and/or the Public Prosecution Service had engaged and were going to rely on Kenneth Richmond, formerly of the U.S. Bureau of Mines, Dr. Paul Amyotte, of Technical University of Nova Scotia (TUNS), Stephen Farrell, P. Eng., former mine manager with Cape Breton Development Corporation (Devco) and Professor Ian Muirhead, P.Eng. from the University of Alberta⁴⁴ to show that the accused had demonstrated wanton or reckless disregard or had otherwise violated the *Coal Mines Regulation Act* with respect to coal dust.

Allegations of inadequate ventilation and other safety violations would be spoken to by Andrew Liney, P. Eng., a self-employed consultant, formerly a ventilation specialist with British Coal. Mr. Muirhead and Mr. Farrell would also provide opinion evidence on these issues.

⁴⁴ Along with numerous witnesses, including other experts in relation to the pre and post-explosion samples that were analyzed at the CANMET Laboratory in Ottawa.

None of the Crown's main expert witnesses testified during the first trial prior to the entry of the judicial stay of proceedings by Judge Anderson.

A number of experts testified at the Westray Commission of Inquiry. These included, amongst others, Dr. Paul Amyotte, Reginald Brookes, Andy Liney, Dr. Malcolm McPherson, P. Eng., and Don Mitchell, P. Eng. (formerly U.S. Bureau of Mines).

The Crown had access to the transcripts from the Westray Commission of Inquiry. They were impressed with the credentials and opinion evidence given by Dr. McPherson. They took steps to retain him. One of the difficulties that the Crown knew about was that there appeared to be some difference of opinion amongst the experts, principally on the issues surrounding the source of the methane that was ignited (and hence the source of ignition), where (not if) methane exploded and the location of where the coal dust exploded.

The Commission of Inquiry had sent a transcript of the testimony of Andy Liney to Dr. Malcolm McPherson and to Don Mitchell to seek their input on the testimony he had given to the Commission of Inquiry. We do not know why, and it is not necessary for our purposes to make the necessary inquiries, but the testimony given by Mr. Mitchell and Dr. McPherson was not sent to Mr. Liney.

The Westray prosecution team forwarded to Andy Liney the commentary and critique prepared by Don Mitchell and Dr. McPherson. Mr. Liney responded with a vigorous defence of his opinions and set out his own views on the faults of the opinions that had been offered by Don Mitchell and Dr. McPherson. It was obvious that Mr. Liney felt strongly enough that he made it clear in December 1997 that if Dr. McPherson was to be a witness at any trial, he would not participate. This position by Mr. Liney remained unchanged.⁷⁷

⁷⁷ Since Mr. Liney was a resident of the U.K., the Crown had no power to compel him to be a witness.

Because there were still outstanding issues that needed to be resolved, the prosecution team proposed a joint meeting of Messrs. Liney, McPherson, and Muirhead.¹⁴ There were recognized dangers in bringing all experts together to discuss their respective opinions. If one or more of the experts changed their opinion due to discussions with the Crown or the other experts, it can impact on the credibility of the opinion. This was appropriately recognized by the Westray prosecution team. They made plain in their discussions and in their correspondence with each of the experts the appropriate purpose. For example, in a letter dated January 8, 1998, Mr. Chisholm wrote:

The prosecution's purpose in bringing you together is not to attempt to achieve consensus of opinions. Rather, our objective is to provide each of you the same factual foundation upon which to formulate your opinions and having done so, to identify areas of agreement and disagreement. Where there is a divergence of opinion we want to understand the basis for any disagreement.

(emphasis in original)

The Westray prosecution team forwarded to each of the experts a list of questions/issues for discussion. This document had already been vetted by Andy Liney. In fact, Mr. Liney came to the meetings on January 12-13, 1998, with his responses already prepared. The Questions/Issues for Discussion document is set out in Appendix "A", Tab 6. In our opinion, many of the questions posed for these experts overstate the burden or exactitude of opinion that needed to be achieved from expert opinion evidence. For example:

I(a) Are you positively certain that on May 9, 1992, a methane layer capable of promulgating (sic) a methane explosion persisted through some portion of SW 2-1 road outbye the headings?;

VIII(b) But for the methane layer in SW 2-1 road outbye the headings, could the ignition of methane, the methane explosion and coal dust explosion at Westray have occurred in the manner in which occurred?

¹⁴ Arrangements were also made for the prosecution team to meet with Don Mitchell in January, 1998. For reasons which need not be detailed the Crown chose not to involve Mr. Mitchell in any further discussion. We are well satisfied that their decision with respect to Mr. Mitchell was not only reasonable but correct.

- (c) *But for the involvement of the accumulation of methane in SW 1, could the ignition of methane, methane explosion or coal dust explosion have occurred in the manner in which it occurred?*

Nevertheless, there were many appropriate questions asked. Furthermore, it can be said that the phraseology in the questions was designed not as a litmus test for the Crown, but to better understand the strengths of the opinion evidence available to them. Opinions that might well wilt under cross-examination are a poor foundation for a prosecution.

It appears that from the meeting on January 12-13, 1998, that the areas of disagreement had been essentially resolved except for the linked issues of what actually caused the methane layer to ignite and where the methane come from that was ignited.

In as concise a way as possible, the disagreement centred on whether or not the continuous miner² was the source of ignition. For any fire to occur, there must be fuel, an adequate supply of oxygen, and a sufficiently hot agent to ignite the fuel.

It was a common theme amongst all experts that methane, in the form of a layer, burned in the roadway leading up to the working face of SW 2-1. Every expert also recognized that there were three possible sources of ignition: the continuous miner which was at or near the working face of SW 2-1, the roof bolter that was working in the lefthander (a small roadway off SW 2-1), or the boom truck (a non-flame proof vehicle which had been driven to the junction of SW 2-B and the SW 2-1 roadways).

Dr. McPherson and Mr. Muirhead, while acknowledging the possibility of the other sources of ignition, favoured the continuous miner as the culprit. Statistics based on previous investigations of

² A large machine with rotating heads that cuts coal at the mine face, and loads it onto a shuttle car.

ignitions in mines would certainly tend to favour the continuous miner as being the most likely source of ignition. Dr. McPherson and Mr. Muirhead also noted the inadequacy of the auxiliary ventilation to deal with the expected release of methane from the operation of the continuous miner. They would certainly not rule out the possibility that a layer of methane from the gob (SW 1 panel) had extended past the junction of SW 2-B and SW 2-1 roadways and up to the working face in SW 2-1.

Andy Liney was of the opinion that, although the continuous miner could possibly be a source of ignition, the methane layer was ignited by the bolter or by the boom truck. It was his opinion that a methane layer existed from SW 1 up to SW 2-B road to, and even into, SW 2-1 roadway, but could not extend to the SW 2-1 heading where the continuous miner was operating. This was due to the existence of the auxiliary vent tube which was carrying out an exhausting mode of ventilation. Without a wick in the form of this layer to the putative source of ignition (the continuous miner) it could not be ignited and travel back to the mine, and there at some point encounter sufficient turbulence to create a general atmosphere of 5% methane and explode. His views were supported by photographs of the continuous miner which showed that it had been withdrawn from the cut. If not cutting, there would no source of frictional ignition. In addition, the auxiliary ventilation tubing in SW 2-1 was burnt but, most significantly, was not burnt at the end closest to the continuous miner.

In our opinion, the views of Mr. Liney on this issue carry some force. However, given the expertise of such individuals as Dr. McPherson and Mr. Muirhead, the Crown did not feel confident that it could exclude the continuous miner as the source of ignition. In light of the other alleged acts of negligence against the accused in their handling of the ventilation and coal dust safety issues, they were of the view that it was not necessary to do so. This view, in our opinion, was reasonable.

There is no need to set out in detail the answer to the Questions/Issues of Discussion or the notes of their various meetings over January 12, 13, 1998. **The responses of all three experts were**

confirmatory of a methane-initiated coal dust explosion attributable to failures to meet legislative or ordinary mining standards in ventilation and/or handling of coal dust.

On January 23, 1998, the Westray prosecution team sent to Dr. McPherson and Mr. Muirhead a letter that requested a further opinion from them. They had also discussed getting input from the experts on any scenarios that could account for the ignition and propagation of the explosion without involving the criminal conduct of the two accused. A copy of the letter is in Appendix "A", Tab 7, along with the enclosure. For ease of reference the text of the letter is as follows:

In the course of assessing the Crown's case against the accused an attempt was made to identify a hypothetical defence scenario by which the May 9, 1992 explosion at the Westray Mine could have occurred without any contribution of negligence by the accused. The scenario under consideration is attached as Schedule A.

The hypothetical defence scenario set out in Schedule A is meant to exclude a methane layer persisting from SW 1 into the headings in SW 2, a methane layer originating from the mining operations in SW2 and the coal dust being involved in the explosion. We would appreciate your reviewing the scenario and providing your opinion whether the scenario: a) is scientifically feasible; and (b) is consistent with the facts of the case. We are not asking for your opinion on whether this scenario actually occurred but rather whether it can be ruled out as a reasonable possibility. If there are facts included in this scenario which are not necessary to support the hypothetical defence position we would appreciate your so advising.

The above scenario, as previously mentioned, is an attempt to fully assess at this point in time the prosecution's case, both from a Crown and Defence perspective.

If you can envisage further scenarios mitigating or excluding the two accused from liability based upon the facts as we presently appreciate them, or upon facts which it could be "reasonable" to assume, we would appreciate the opportunity to consider such together with suggested rebuttals or opinions as to the reasonable likelihood of such scenarios actually having occurred.

We are hoping to further consider this scenario, and other is provided, on Monday, February 2, 1998. We would greatly appreciate the benefit of your views prior to that date.

Yours very truly,

Mr. Muirhead and Dr. McPherson responded to the hypothetical defence scenario⁹⁰ in separate written communications, both dated February 1, 1998. Both offered cogent reasons why the hypothetical defence scenario was not a reasonable possibility. At one point, Dr. McPherson suggested that an aspect of the hypothesis really does "stretch credulity." Mr. Muirhead was of the view that he did not consider the facts and sequence of events as being supportive of the hypothesis. He too offered cogent reasons for his opinion.

Interim Report to the Director of Public Prosecutions Re: Reasonable Likelihood of Conviction

It is important to note at this stage a letter to Mr. Pitzul dated February 9, 1998, produced by the Westray prosecution team of Marc C. Chisholm, Q.C., Robert F. Fetterly, and Robert C. McCarroll. This letter is reproduced in Appendix "A", Tab 8. The operative part of the letter is:

After extensive review and discussion of the evidence, members of the prosecution team continue to harbour concerns regarding the strength of the Crown's case against Gerald Phillips and Roger Parry. At this point in time, the consensus view of Robert Fetterly, Robert McCarroll and myself is that there is a reasonable likelihood that a conviction would result on both the criminal negligence and manslaughter charges if we proceed to trial. Having said that I hasten to add that in our opinion the case just meets the reasonable likelihood standard. Further, our assessment assumes that the Crown will be able to prove, certain essential facts which we have not yet substantiated and that it is in the public interest to proceed.

⁹⁰ The scenario was not sent to Andy Liney. It appears that the hypothetical defence scenario was a collaborative effort between Mr. Liney and the Westray prosecution team put together during their meetings of January 1998.

Over the next three weeks with the assistance of the RCMP, we plan to focus our efforts on attempting to substantiate certain critical facts and having done that reassess the likelihood of conviction. In addition, we intend to finalize our position respecting the public interest issue. I will correspond further on these issues by the end of February.

Although the language is cautious, it is a written recognition that following the meeting of the experts, including considerations of the hypothetical defence scenarios, the opinion of the team was that there was a reasonable likelihood of conviction.

Report on Public Interest (Report #1)

The report on public interest was not forwarded, as anticipated, by the end of February 1998. Mr. Chisholm wrote to Mr. Pitzul on March 6, 1998, confirming their agreement that the report on public interest be delayed until after they had an opportunity to meet with the Westray Families Group and the RCMP investigators to solicit their views on whether the prosecution should continue. A number of the prosecution team met with the Westray Families Group on Sunday, March 1, 1998. They also met with the investigating officers on March 6, 1998.

The Report on Public Interest is dated March 24, 1998. It was sent to Mr. Pitzul under cover of letter dated the same day. However, it is clear that the Report went through many drafts and revisions. Outlines of this Report were being prepared as early as April 1997.

It is a well written report. The full Report is set out in Appendix "A", Tab 9. We do not feel it necessary to review this lengthy Report or comment on its theoretical approach to the issue of whether or not the prosecution would be in the public interest. However, to the extent that the Westray prosecution team refers to the sufficiency test, since that is the basis upon which they terminated this prosecution, it is important to know the principles which they identified as applicable and their views as of the date of this report.

Their stated analysis was as follows:

PROCESS OF ANALYSIS:

Before considering the public interest in continuing a prosecution, once charges have been laid, the prosecution must be satisfied that the admissible evidence will satisfy the threshold test respecting a conviction. The present threshold test in Nova Scotia is that the admissible evidence ensures a reasonable chance of conviction.

In determining the chance of conviction the strength or weight accorded to the anticipated admissible evidence led by the Crown is only part of the exercise. Appropriate consideration must be given to credible factual defences or alternatives, conflicting or non-complimenting [sic] opinions of experts, legal or factual obstacles to the admission or weight of crucial or corroborative evidence, witness procurement or conduct at trial, and Charter and common law applications.

By memorandum to you dated October 29, 1997, Robert Hagell, then a member of the Westray prosecution team, expressed the opinion that there is no reasonable chance of conviction on any of the charges and it is not in the public interest to proceed (a copy of the memorandum is attached as Schedule A). Art Theuerkauf and Andrew Macdonald, presently members of the Westray prosecution team, did not offer an opinion on these two issues because of the possibility of a perceived conflict of interest. At the present time the Crown Attorneys are satisfied that there is just a reasonable chance of conviction on the manslaughter charges (see comments on p.44 regarding the meaning of 'reasonable chance'). Differences of opinion amongst the Crown Attorneys as to the strength of the Crown's case on the criminal negligence charge range from it just meeting the reasonable chance test to a view that there is a 60% chance of conviction. The Crown Attorneys all agree that the Crown's case on

the criminal negligence charge is stronger than on the manslaughter charge.

Report #1 "Public Interest"⁹¹

In our opinion, there is nothing inappropriate in the defined approach by the Westray prosecution team to the issue of the sufficiency of evidence test. The team went on to discuss the uncertainty of the team as to how to interpret the sufficiency test, "reasonable chance of conviction," and whether or not the public interest factors justify or dictate a higher sufficiency of evidence threshold. As noted in our interim report of June 16, 1998, it is not surprising that the team was uncertain on what the test meant.

We have already noted earlier that the Westray prosecution team asked for guidance from the Director of Public Prosecutions. The Report and its implications were scheduled to be discussed at a meeting with the Director of Public Prosecutions and the management committee on March 26, 1998. Ultimately, no direction was given by the Director of Public Prosecutions or the Management Committee to the Westray prosecution team as to the appropriate interpretation of the threshold test "reasonable chance of conviction," and on any change in that test due to public interest factors, and the overall issue as to whether or not the prosecution was still in the public interest.

The reasons that these issues were not considered at the meeting of March 26, 1998, was the perceived impact of the communication sent by Andy Liney on March 24, 1998. It was this communication and its impact on the prosecution's case that took up the meeting.

⁹¹ p. 2-3. Although Mr. Hagell was, in his written materials of October 29, 1997, clearly of the view that it was not in the public interest to proceed and that the prosecution ought to be terminated, we are far less certain that he was actually of the opinion that there was not a reasonable chance of conviction. It is a fairer characterization to say that, given the state of the file as he perceived it, he was not in a position to be able to say whether there was or was not a reasonable likelihood of conviction and that he did not foresee a time that he would be able to say that there was or was not such a likelihood.

Andy Liney's Opinion - March 24, 1998

Before setting out the content of Mr. Liney's facsimile transmission of March 24, 1998, it is important to understand what lead up to that communication.

On March 19, 1998, Marc C. Chisholm, Q.C. sent a seemingly innocuous handwritten facsimile transmission to Ian Muirhead, Dr. Malcolm McPherson, and to Andy Liney. The full text of it to Dr. McPherson and Mr. Muirhead is:

I have reviewed your opinion on the ignition and propagation of the Westray explosion. I have a follow up question concerning the possible propagation of the explosion. Is it a reasonable possibility that the coal dust did not explode. In other words if the suggestion were put to you that the coal dust did not explode would you reject it as completely unreasonable or see it as a reasonable possibility. A brief reply is all that I require.

Your early response would be appreciated.

Letter from Marc C. Chisholm, Q.C. to Dr. Malcolm McPherson

I have reviewed your opinion on the ignition and propagation of the Westray explosion. My question is: Is there a reasonable possibility that the coal dust at Westray did not explode? I'm not asking for your opinion on whether the coal dust exploded but rather how would you respond to a suggestion that it didn't explode. Would such a suggestion be seen as a reasonable possibility or would you completely reject it. A brief response is all that I require.

An early reply would be appreciated.

Letter from Marc C. Chisholm, Q.C. to Mr. Ian Muirhead

Dr. McPherson responded the same day. His facsimile transmission is reproduced in Appendix "A", Tab 10. He simply stated:

Dear Mr. Chisholm, In response to your question received today, I have absolutely no doubt that a coal dust explosion occurred at the Westray Mine. That opinion is based on the extent of the explosion, the forces developed during the explosion and the condition of the bodies found in the north workings. The copious amounts of coal dust that were present in the mine gave virtually classical conditions for the propagation of a coal dust explosion.

Ian Muirhead also replied promptly in a two page facsimile letter dated March 21, 1998. His letter is reproduced in Appendix "A", Tab 11. He set out a number of reasons for his opinion, and concluded:

I would reject completely the suggestion that the coal dust did not explode as this would be contrary to a number of well established facts and sequences.

The facsimile transmission to Andy Liney was somewhat different. In addition to asking the same question as to whether or not it was a reasonable possibility that the coal dust did not explode, Mr. Chisholm asked for an explanation about Mr. Liney's opinion on the impact of eliminating or not eliminating the continuous miner as a possible source of ignition. The text of the inquiry dated March 19, 1998 is as follows:

I have been reviewing my notes of our January 1998 meeting, after the joint meeting with Dr. McPherson and Mr. Muirhead. My notes indicate a statement along the following lines, by you: Unless we can eliminate the continuous miner as a possible source of ignition, we're sunk. Assuming I accurately captured the gist of your statement, are you still of that opinion?

Could you briefly explain why or why not.

You have already provided your opinion that the coal dust at Westray exploded and given your reasons for that position. We expect the defence to suggest the coal dust did not explode. Is it a reasonable possibility that the coal dust did

not explode? A yes or no answer or brief explanation is all I require. Your early reply will be appreciated.

Letter from Marc C. Chisholm, Q.C. to Mr. Andy Liney dated March 19, 1998.

The response by Mr. Liney was dated March 24, 1998. It is a three page letter sent by facsimile transmission. A copy of it is in Appendix "A", Tab 12.

Mr. Liney described the impact of failure to eliminate the continuous miner as one where they may not be "sunk" but they would certainly be "holed below the water line." In relation to coal dust his view was: "I do not believe that we can prove beyond reasonable doubt that coal dust was involved, despite my conviction that it is clearly implicated on the balance of probabilities."

There are various statements in his letter of March 24, 1998, that raise concerns about his understanding of the appropriate role of an expert witness. He wrote:

I would firstly remind you that I still consider that there is strong evidence that the continuous miner was not, and could not have been, involved, and no evidence whatsoever to actually implicate it. It appears that an initial false position was taken on this issue immediately after the explosion, and that this is to be the sole basis of implication. Messrs. McPherson and Muirhead were unable at our meetings to offer any evidence or logical reasonings to support the continuous miner's involvement. I base my position on witness statements, photographic evidence, logical reasoning, to some extent, intuition. Whilst I accept this may not be sufficient evidence, and that the judge may choose to consider the continuous miner as an option, it is my opinion that the evidence regarding the continuous miner is stronger than the evidence relating to all other matters associated with the explosion. As such, not only would I continue to prepare the case with the intention of proving that the continuous miner was not involved. I would further suggest that if we cannot win this argument then we have little chance with any of the other matters.

(emphasis added)

The language that Mr. Liney used demonstrates that he took on the role of fact finder or legal counsel, prepared to form opinions as to the likely outcome before a trier of fact. Mr. Liney had never testified in a criminal trial. His commentary demonstrates his lack of appreciation of how a trier of fact actually can go about arriving at conclusions.

From a strict technical or legal point of view, his opinions might have little impact at trial. However, from a practical point of view, it would provide excellent fodder for the defence when the Crown's other experts do include the continuous miner as the most likely source of ignition.

He went on to write:

On this basis, I find it difficult to believe that we could prove beyond a reasonable doubt that SW 1 methane was involved as a primary fuel with evidence which was inferior to that which your legal opinion discounts as sufficient to disprove the involvement of the continuous miner, and involvement solely as a secondary fuel would be too tenuous.

p. 2

Mr. Liney's role was to offer an opinion based on the evidence that was available to him. The purest avenue to formulation of expert opinion is the use of hypothetical questions posed by either the Crown or the defence. The parties then set out to adduce the necessary evidence to substantiate the hypothetical facts relied upon by an expert.

An expert cares not what impact his or her opinion has on the outcome of the case. Mr. Liney either took on himself, or was allowed to take on, a role not just of being a consultant but close to being the final arbiter on the Crown's ability to prove its case beyond a reasonable doubt. The dangers are obvious. First and foremost, we have no way of assessing whether or not Mr. Liney has an appropriate understanding as to what reasonable doubt means; nor, whether or not he truly

understands the evidence that is available to the Crown and what it is the Crown need prove beyond a reasonable doubt in order to establish criminal liability.

The extent to which he assumed this role and its dangers is highlighted by his comments in relation to coal dust. He wrote:

(b) In relation to the coal dust, I do not believe that we can prove beyond reasonable doubt that coal dust was involved, despite my conviction that it is clearly implicated on the balance of probabilities. The evidence implicating the coal dust is entirely circumstantial and anecdotal in that we are firstly seeking source of fuel which caused the substantial increase in violence at the exit from the South West and throughout the North Mains, and secondly, we have evidence of substantial accumulations prior to the explosion.

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Despite the strength of general intuition that a coal dust explosion almost certainly occurred, it has been my opinion since my first involvement with the case, and it remains my opinion, that there is insufficient evidence to support a manslaughter conviction relating to coal dust.

Andy Liney repeats his opinion that he doubts that "we" can prove beyond a reasonable doubt that coal dust was involved. He cites his own conviction that a coal dust explosion almost certainly occurred but that the evidence implicating coal dust is entirely circumstantial and "anecdotal." Despite the widespread belief amongst lay people that circumstantial evidence is an inherent sign of weakness, experienced counsel know that circumstantial cases can be exceedingly persuasive.

His reference to "anecdotal" evidence is telling. Anecdotal evidence in the scientific world is a label usually applied to subjective accounts of phenomena that cannot be reproduced or have not yet been reproduced in a scientific setting. It carries the connotation of inherent weakness.

In the forensic world, anecdotal evidence is simply another term for eyewitness testimony. It is the usual medium of the court's fact finding process. There is no doubt that not all eye witness testimony is reliable. It can be subject to attack on the basis of opportunity to observe bias or motive to harm, and inconsistency with other known facts. There were a host of witnesses available to speak to the pre-explosion mine conditions, in particular the accumulations of coal dust not subjected to adequate stone dusting. Eliminating the poor and unreliable witnesses and even the witnesses who would provide the most damaging evidence in relation to lack of appropriate stone dust and accumulation of combustible coal dust, there would still be a formidable number of witnesses to support the Crown's coal dust case.

SECTION IV: DECISION ON TERMINATION

The team immediately sent a copy of Mr. Liney's letter of March 24, 1998, to Jerry Pitzul. A Management Committee meeting was held on March 26, 1998. Although issues of the public interest issue were discussed, it is apparent that the bulk of the meeting was taken up with discussion about the relative strengths and weaknesses of the Crown's case and the potential impact of Mr. Liney's letter of March 24, 1998.

It is clear that no decision was made at this meeting. The team requested additional time to consider the import of the letter - essentially time to consider and reflect on the impact of this opinion.

It had been known at that time that Jerry Pitzul had accepted an appointment as the Judge Advocate General of the Canadian Armed Forces. His position as Director of Public Prosecutions was to come to an end on April 1, 1998.

What does seem to have been decided at the March 26, 1998, Management Committee meeting was that:

- the team would arrive at a position
- communicate that position to the Deputy Director of Public Prosecutions, Martin E. Herschorn, Q.C.
- it would be up to Mr. Herschorn to liaise with the Attorney General
- there would be a meeting to discuss the process on how to best deal with the families, the accused, police, the court, and the public

The initial reaction of the team on receipt of Mr. Liney's letter of March 24, 1998, was that his opinion was devastating. They could see no cure to it. There was no longer a reasonable likelihood of conviction on both charges. This initial reaction ameliorated somewhat.

In a team meeting of March 30, 1998, the majority of the team felt that there was not a reasonable chance of conviction on both charges. It is fair to say that the team wanted to be sure that they properly understood what Mr. Liney had written. The only things that were decided for certain by this point in time was that the team would follow-up with Mr. Liney, while at the same time, a draft letter to Mr. Herschorn would be prepared setting out their reasons for discontinuance of the prosecution.

March 31, 1998 - June 22, 1998

A letter was sent dated March 31, 1998, to Mr. Liney. A copy of it is reproduced in Appendix "A", Tab 13. It was a pointed letter. It took extracts from Mr. Liney's facsimile transmission of March 24, 1998, to illustrate that, to the Westray prosecution team, many of his comments appeared to be entirely inconsistent with the team's understanding of Mr. Liney's opinion.

They also asked him to set out his understanding of the legal terms that he had used. Included in that list was "proof beyond a reasonable doubt;" "circumstantial evidence;" "balance of

probabilities.”

Mr. Liney wrote back the next day. A copy of his letter is reproduced in Appendix “A”, Tab 14. As can be seen from the complete text of the five-page letter, the tone was frosty. He wrote:

Apparently my correspondence of 24 March, 1998 has caused unintentional consternation although I am not sure that this justifies the tone of your response. Perhaps I should have followed my initial instinct which was to not even reply to your fax of 19 January, [sic - March] 1998, as I find that we are going around in circles and I am being asked to repeat opinions which I have stated quite clearly in the past. It is probably inevitable if you ask the same question enough times, especially following the provocative manner in which the continuous miner issue was raised in January, that you will eventually receive an answer in a form of words which you do not like, although that was not my intention.

Further input or clarification was also sought from Dr. McPherson.

Mr. Chisholm wrote to Dr. McPherson on April 9, 1998, asking for clarification of Dr. McPherson's correspondence of February 1, 1998, including details as to what evidence might be consistent or inconsistent with Dr. McPherson's "hypothetical defence scenario 2."

Dr. McPherson responded on April 12, 1998. He cautioned that the hypothetical defence scenario 2 was something that he did not believe happened. If it did occur that way, a prudent mine manager would not have endangered mine personnel in the manner that they did.

On April 8, 1998, it was decided to try to bring Mr. Liney to Halifax to go through all information in relation to ventilation. In this way, the team could ensure that he had all relevant information before finalizing his opinion. There was a division of opinion in the team. Some believed that Liney's opinion was fatal. Others were of the view that it did indeed result in there being no

reasonable likelihood of conviction, but only if their understanding was correct and there was no additional information which might change his opinion.

Work continued on drafting a letter to Mr. Herschorn while at the same time input and further opinions were being sought from Mr. Liney, Dr. McPherson, and Mr. Muirhead. Arrangements were made for Andy Liney to come to Nova Scotia mid-May to review all ventilation materials. Attempts were made to bring Dr. McPherson to Nova Scotia as well. Interviews of other witnesses were arranged. The team continued to ask the RCMP investigators to assist them in confirming factual information.

Arrangements were finalized for Mr. Liney to come to Halifax, May 3-13, 1998. He reviewed 68 binders of what was, essentially, ventilation information that members of the team had assembled. The team then met with Mr. Liney and went through a 'debriefing' of what further information he had found and what impact it may or may not have on his opinion.

Mr. Liney did not change his opinion. He expounded on issues that, if correct, created further concern for both the ventilation and coal dust aspects of the Crown's case. Informally he would offer the view to the Crown that they did not even have a 1% chance of success.

After Mr. Liney's attendance in Halifax, he followed up with a number of letters. The first was a six-page letter dated May 21, 1998, identifying the potential to track down information regarding the set-up or adjustment of the methanometer on the continuous miner.

He then followed up on his findings and opinions in a 17-page letter dated May 25, 1998. A copy of this letter is reproduced in Appendix "A", Tab 15. In our opinion, the members of the Westray prosecution team relied heavily on the contents of the letter of May 25, 1998, in their reasons for recommending that the prosecution be terminated.

In our opinion, the letter contains theoretical and factual errors. Amongst other things, Mr. Liney wrote:

1/2/3 Does the evidence prove that the accused allowed excessive amounts of coal dust to accumulate in the mine?

a. Post-explosion sampling:

I have previously queried the value of post-explosion sampling on the grounds that it was impossible to prove that coal dust was not moved around the mine during the explosion, depleting certain areas and increasing amounts in other zones. It may be for example that some coal dust was drawn back into the South West after the explosion as gases cooled. Therefore, only sampling which could be demonstrated to be representative of the whole mine, taking all the coal dust and all the inert could identify a global shortage of inerting materials, and even then could not be used to identify a particular area where inertisation was definitely insufficient. In the event, sampling was localised due to lack of access to the north sections.

In reading a paper by Tideswell, I further recognised the point that even in the same location, assuming dust was put down close to its origin after having being lifted by an explosion, the fact that fine coal dust may be preferentially raised into the air might also mean that it therefore preferentially occupied the upper layers of the dust later re-deposited, so normal sampling techniques might give an enhanced coal dust concentration. Although the sampling depth varies between different legislative jurisdictions (0.25" in CMRA), all sampling systems only take dust from shallow depth and would be affected by such a consideration. Generally, Tideswell is negative on the value of post-explosion sampling. Although his work was undertaken several decades ago, the lack of recent coal dust explosions still means that his opinions are valuable as few recent experts have had the opportunity of studying real incidents in such depth.

Furthermore, the post-explosion sampling that was undertaken does not appear to be fully representative even of the limited areas sampled. A fifty yard "zone" (the length typically sampled in jurisdictions whose legislation is UK based, including CMRA) has to be sampled throughout its length in order to assume the result is representative of that roadway. Spot sampling at fifty yard intervals is not acceptable. Although the Coal Mines Regulation Act

("CMRA") identifies that samples will be taken "over an area not less than fifty yards in length", it does not specify how many such zones will be tested per unit length of roadway, nor how often. It must be said that the CMRA here lacks detailed guidance as in many other of its provisions. Although the RCMP samplers were trained by Cape Breton Development Corporation ("Devco") personnel, (whether this was for sampling technique or sampling location is not known) their legislation is also unclear, no reference to sampling being found in the Coal Mine (CBDC) Occupational Safety and Health Regulations. Nevertheless, Devco tend to follow UK practice.

Mr. Liney's suggestion that sampling had to be done throughout the whole of the mine and even then could not be used to identify a particular area where the dust was not properly inert, is not consistent with any other expert opinion known to us. As explained in the Westray Commission of Inquiry, and in each and every expert's report, the whole basis of having coal dust inerted to at least 65% (and throughout large portions of the Westray Mine it was required to be to 85%) is that once a methane explosion initiates a coal dust explosion,⁹² a properly inerted roadway will inhibit and eventually stop the dust explosion from carrying on throughout a mine. The legal requirement to inert is based on that principle. If one or more of the miners underground were killed by an explosion that propagated due to the presence of a portion of a roadway not properly inerted, the legal requirement has been violated. It would be ludicrous to suggest that the Crown had to prove that every roadway throughout the mine fell below the statutory inertiatization criteria.

As noted in the quotation set out above, Mr. Liney says that Tideswell is "Generally, negative on the value of post-explosion sampling." His reference to Tideswell is to an article written by Dr. F. V. Tideswell in 1952. Mr. Liney had come across this article as a catalogued document in his review of the ventilation binders in May 1998. Tideswell actually wrote:

⁹² Indeed, properly inerted coal dust is not supposed to explode in the first place although some experts have identified that if the dust is fine enough and dry enough, an inert of 65% may not be adequate to prevent an explosion.

It is customary to take strip samples from the roof and sides, and floor over every 50 yd. of the affected area and beyond, with a view to assessing the composition of the road dust available to the explosion. Excluding the regions of heavy falls, or of upsetting of coal in transport, such samples do give a rough guide to the general composition of the road dust before the explosion."

Dr. Tideswell also wrote in the same article:

"... The inference is that the strip samples were a fair guide to the composition of the dust on the roadways at the time of the explosion, and that while the dust-cloud through which the flame passed was possibly 2 to 3% richer in combustible content, perhaps through preferential raising of exposed coal-dust, there was no serious failure of the stone-dust to disperse."

Mr. Liney also wrote that the post-explosion sampling was not representative even of the limited areas sampled. He suggested that "spot sampling at 50 yard intervals is not acceptable."

There can be little doubt that the more extensive a sampling plan, the higher the confidence one should be able to have that the results are representative of the roadway from which they are taken. The samples that were taken by the RCMP were in accordance with the recommendation by Kenneth Richmond, a person eminently qualified to suggest that taking samples every 100 feet was adequate. A similar opinion had been committed in writing by the expert initially engaged by the

¹¹ *Ibid*, p. 164.

¹² Methods of Examination Following a Colliery Explosion, [1952-53] 112 Transactions - The Institution of Mining Engineers 158 at p. 165.

Department of Labour, Don Mitchell.⁹⁶

Quite apart from the questionable theoretical basis, spot sampling at 50 yard intervals is not what occurred. The vast majority of the post-explosion samples were taken by the RCMP. Generally speaking, they were taken over 50 metre zones with 5 samples taken every 10 metres. This is not to suggest that the defence could not point out that the samples did not include the roof and hence were not in strict accord with the *Coal Mines Regulation Act*. However, the sampling done was not simply "spot sampling at 50 yard intervals".

Mr. Liney also wrote comments that cast doubt on the ability to rely on pre-explosion sampling. Samples were taken prior to the explosion on April 29 and May 8, 1992. Although the areas from which the samples were taken were not extensive, it is not accurate to call them random spot samples. They were taken from limited areas, but were made up of multiple samples taken over a 50 yard zone.

Mr. Liney was correct to point out that the April 29, 1992, samples were only tested for ash content and not for total incombustible levels. He makes little or no reference to the May 8, 1992, samples taken from the #1 main slope outbye⁹⁷ #10 cross-cut and from the #1 north main inbye #2 cross-cut.

⁹⁶Mr. Mitchell had written to the Department of Labour on May 16, 1992, setting out the general guidelines to investigating the explosion. He stressed the need for a generous collection of samples. In a follow-up letter dated June 27, 1992, in relation to the investigation, he recommended that samples of dust be taken at 300 foot intervals. In addition, Mr. Mitchell had been a co-author of a U.S. Bureau of Mines publication supporting the validity of post-explosion sampling providing the samples were taken at least every 100 feet. "Experimental Coal Dust and Dust Explosions", U.S. Bureau of Mines Report, No. 6344 (1963), p. 17. See also Clete Stephan "Dust Sampling and Laboratory Testing Procedures After Underground Coal Mine Explosion", Report #02-253-86, September 10, 1986, Bruceton Safety Technology Centre, Mine Safety and Health Administration.

⁹⁷ Outbye is a coal mining term that refers to locations or movements towards the mine entrance. Locations within a mine are often referred to as being outbye or inbye a certain reference point. For example, the reference to samples taken in the #1 main slope outbye the #10 cross-cut refers to a point in the #1 main tunnel located between #10 and #9 cross-cuts. A location that is inbye a specific point refers to an area further into the mine.

He makes the comment:

Taken in association with inherent ash levels as high as 65% (based on known strata sampling data, and reinforced by samples taken directly from the shuttle car, post-explosion which reached 75% inert), this means that: "coal" dust could be claimed to be well on the way to reaching the required inert levels without addition of significant stone dust.

p. 3

It is difficult to argue that some results from material from the mine showed ash levels as high as 65%. It is inaccurate and misleading however, to suggest that that was the inherent ash level of coal being mined at Westray.⁹⁸

Mr. Liney went on to offer the opinion that coal preparation plant samples did not appear to have any evidential value to the Crown, but that the very high inherent ash contents might be used advantageously by the defence to infer a low stone dust requirement to achieve the legal inert status. This opinion by Mr. Liney was in stark contrast to the report commissioned and received by the Westray prosecution team from Dr. Paul Amyotte in December, 1997. As will be discussed later, Dr. Amyotte is an expert in the explosibility of dusts, and coal dust in particular. It was his opinion that the ash content of coal samples from the mine would be indicative of the ash content of the dust that would be produced from that coal. He was careful to point out that the analysis from the wash plant samples could not, by themselves, determine the combustible or incombustible content of the dust in the mine. Only analysis of the mine dust could provide such definitive information. He concluded:

⁹⁸ For example, in a memorandum distributed to Gerald Phillips, Roger Parry, and others, dated November 21, 1991, it was noted that the south west section was averaging 40-45% inherent ash content and cautioned that they needed to ensure that the mine is kept clean and dust free.

What the coal analyses do indicate, however, is that any dust generated from this coal would not meet the provincially regulated level for mine dust of no more than 35% combustible matter (ie. no less than 65% incombustible matter). The coal analyses, in my opinion, clearly indicate the need for admixture of rock dust in appropriate amounts to dust generated from the coal being mined."

Mr. Liney went on to examine the issue of the significance of the amount of stone dust purchased by Westray. Mr. Muirhead had compared the amount of coal produced and the length of the roadways in the mine, and by using industry standards concluded that Westray had not purchased enough stone dust to properly inert the mine.

Mr. Muirhead was of the opinion that it is normal to use 1-2 bags of stone dust per metre of roadway as an initial application, and thereafter a half of a bag of stone dust per metre for each reapplication. This equated to a requirement of 210,000 kg for an initial application of stone dust. According to the records from Westray, and from their supplier, they purchased 180 tonnes of stone dust between March 1991 and March 5, 1992. This equates to 163,636 kg.

Mr. Muirhead also approached the issue from applying normal industry standards in relation to the quantity of coal produced. It was his opinion, which we have not seen challenged, that the normal industry standard is to apply stone dust at the rate of 1-2 kg per tonne of coal produced.

According to Westray records, they produced 236,000 tonnes of coal from October 1, 1991, to May 1992. They only had available approximately .7 kg of stone dust per tonne produced. This assumes that all stone dust purchased was *applied* an assumption which is not accurate since stone dust was still stockpiled on the date of the explosion of May 9, 1992.

¹¹ Dr. Amyotte's Report, December 18, 1997, p. 5.

Mr. Muirhead also examined the records available to him on the application of stone dust. Out of 241 production days, he could find stone dust being applied 18 times. It was his opinion that it should have been applied at least 100 times. It is certainly possible that stone dust was being applied, but its application was not being recorded.¹⁰⁰

However, Andy Liney concluded on this point as follows:

Assuming that is [sic] was distributed effectively, for which there is no evidence, the amount of stone dust purchased would, in my opinion, be sufficient to achieve the legally required inert levels (85% inert almost universally due to the diesel vehicle approval requirements) if the highest assumptions for inherent ash and moisture are taken. Furthermore, my recent reading revealed that the floors of the main slopes had been covered with road gravel presumably for consolidation purposes, but that this gravel had degraded over time with vehicle wear and effectively disappeared. If this gravel were spread over the bulk of the stone drift section, a substantial tonnage must have been used. Any such material which degraded sufficiently would contribute to the inert content, and resulting fine dust could be carried in the ventilation current and re-deposited further inbye, particularly in the low velocity area inbye #10 cross-cut where the air split effectively halved the air flow and thus halved the velocity in what was a similar cross-section roadway. Muirhead's calculations regarding the inadequacy of stone-dusting study the subject from a theoretical requirement per tonne of coal mined, but do not appear to take into account the actual ash content nor the substantial contribution from degraded gravel.

p. 4, May 25, 1998

Mr. Liney's opinion requires the "highest assumptions" for inherent ash and moisture. We have no idea what those "highest assumptions" are. More significantly, there is absolutely no basis to take the highest assumption. His references to gravel on the roadway and its impact on inert levels of dust in the mine are even more problematic.

¹⁰⁰ It appears that the second team's review of the documentation turned up some additional instances that stone dust was applied, but it appears to still be far less than the recommended application rate stated by Mr. Muirhead.

Leaving aside for the moment the factual underpinnings for his assertion, which we will detail later, there is no basis to suggest any validity to the notion that dust from gravel of unknown chemical composition could be of the size, quality or quantity to have any impact on the safety requirement to stone dust on a regular basis to bring coal dust throughout a mine to the requisite inert standard.

It is a common theme amongst all experts that, to be effective, stone dusting must be carried out at regular intervals and be applied throughout the mine wherever coal dust is present. Not only must it be done throughout the mine on a regular basis, but the stone dust or rock dust that must be applied has to be of a certain size and chemical composition. This is amply demonstrated in the report by the Honourable Peter Richard in the Westray Commission of Inquiry. It is set out in the *Coal Mines Regulation Act*.

In our opinion, the suggestion by Mr. Liney that gravel, assuming that it had been applied on the floor to the main slopes, contributed in any real way to the inert content of the coal dust in the mine, is untenable.

Mr. Liney went on to answer the question "Did the coal dust explode?" with the following comments. He wrote, in part:

4. *Did the coal dust explode?*

Although it is generally accepted that the more violent coal mine explosions are associated with coal dust, due to the spread and availability of fuel and higher potential fuel content per unit volume of roadway, it would be difficult to prove that the violence observed at Westray had to have resulted from a coal dust explosion. The photographic evidence in the South West only indicates significant violence outbye of SW-1 in B1 and C roads, but even here no more than might be attributed to a severe methane explosion. The reported violence in the North Mains was significantly more severe, although in some cases the effects may have been confused by substantial roof falls resulting from disturbance of roof supports (steel legs, arches, wooden chocks, etc.) in areas known to have extremely poor roof conditions. Only one victim was

reported as being dismembered, while those recovered from the north, although damaged by some blunt trauma, were substantially intact.

Tideswell adds to this by stating that, when a methane explosion occurs at or above 10% concentration, the degree of violence does not increase if this becomes a coal dust explosion, implying that the potential additional fuel content is irrelevant, probably on the basis of the fact that the gas explosion is at or above a stoichiometric concentration and thus the explosion becomes oxygen limited. Taking this point on board, it is probably true that the violence associated with coal dust is related more to its extent than its degree, because few explosions have access to widespread accumulations of methane sufficient to generate a continuous 10% in the general body in reasonably ventilated mines. In the case of Westray, there was a substantial accumulation of methane in SW-1 which was of the required volume. However, the mechanism by which this could have spread through the northern workings is more difficult to imagine. Assuming the body of gas remained substantially intact until first ignited the bulk of the methane would be protected from ignition by lack of oxygen compounded by large volumes of inert combustion products at the entrance to SW-1. The only mechanism that would then allow this explosion to pass through the North Mains whilst still relying on SW-1 gas as a fuel would be that a large volume of unburned methane was ejected and preceded the flame front whilst mixing into the flammable range. This is far less likely than the more obvious explanation that the initial methane explosion raised coal dust in #1 North Main inbye #10 cross-cut and that thereafter, albeit soon running out of fuel, the explosion comprised entirely of coal dust.

pp. 6-7, May 25, 1998

We reproduce these parts of the letter of May 25, 1998, because the Westray prosecution team relied heavily on these comments in setting out its reasons in their letter of June 22, 1998, to Mr. Herschorn. They also illustrate what is, in our opinion, a fundamental flaw in Mr. Liney's approach to a number of issues.

Throughout much of his analysis, he focuses on one piece of evidence at a time. He took this approach in examining the issue as to whether or not the mine dust at Westray had been inerted to the requisite standard set out in the *Coal Mines Regulation Act*. He examined the post-explosion sampling procedure and results. He found them inadequate and therefore concluded they had no evidential value. He next dismissed the pre-explosion samples. Again, in his opinion, they were of no value. He then examined the evidence as to the quantity of stone dust available for distribution and discounted that evidence standing alone. The list can go on. The approach of examining individual pieces of evidence rather than the total body of evidence available is incorrect. A piecemeal examination to determine the significance establishing certain facts was authoritatively rejected by the Supreme Court of Canada in *R. v. Morin* (1988), 44 C.C.C. (3d) 193.¹⁰⁰

In a similar fashion, Mr. Liney approached the issue as to whether or not the coal dust exploded. As noted in the quotation from page 6, extracted above, he examined only the probative value of the violence at Westray as being determinative of whether or not there was a coal dust explosion. He carried out a subjective assessment of the nature and extent of the violence. The only other factor he considered was the troublesome one of where the fuel came from to cause the degree and extent of the violence in the north mains.

No one could argue with the fact that there was a substantial quantity of methane in SW 1 (the old gob). Despite acknowledging that it was difficult to imagine by what mechanism the methane could have been spread throughout the northern workings (against the ventilation),¹⁰¹ he makes the assumption that a body of gas remained substantially intact from ignition due to the lack of oxygen (a not unreasonable assumption since it is based on the sound scientific principle that things cannot ignite without adequate oxygen). He identifies that the only mechanism that will allow the explosion to go through the north mains, without it being a coal dust explosion, would be for a large volume of unburned methane in the north mains to be ejected. This volume of gas would then

¹⁰⁰ We certainly don't wish to imply that Mr. Liney ought to have been aware of the appropriate approach that a trier of fact would have to go through in assessing evidence.

¹⁰¹ He described it as being "difficult to imagine".

precede the flame front, mix into a flammable range throughout the north mains, and then ignite. He himself recognizes that this is a far less likely explanation than the more obvious one that an explosion occurred comprised entirely of coal dust.

There was absolutely no evidence to substantiate this speculative scenario. It was contrary to the opinions of respected experts such as Dr. McPherson and Mr. Muirhead; it was also contrary to his own opinions that he had expressed on other occasions. We note that Mr. Liney was hypothesizing and did not necessarily believe that this scenario actually occurred.

In addition, there was a host of issues surrounding the ventilation aspect of the Crown's case. We need only refer to one of the issues that Mr. Liney raised. This was Mr. Liney's interpretation of the information reported by Don Mitchell that Gerald Phillips had told Claude White (a Department of Labour employee) on September 4, 1992, of a theory that explained the presence of sufficient methane to become ignited and create an explosion.

The theory reputedly espoused by Mr. Phillips on September 4, 1992, was that a fall had occurred in #3 cross-cut, just outside the SW-1 panel (old gob) of such a magnitude that an air blast damaged the seals in SW 1 and allowed a sudden outflow of methane.

Mr. Liney concluded that he would entirely discount the possibility that a fall in such an open roadway would have generated such an air blast to damage even the flimsiest of seals. However, he placed significance on the fact of a suggestion of a fall, by Mr. Phillips, saying that it raised the possibility that it occurred prior to the explosion, as opposed to being caused by the explosion. He theorized that if the fall occurred prior to the explosion on May 9, 1992, there would be a restriction in ventilation in the area of the #3 cross-cut which would create a pressure differential across the seals to SW 1. This would create, in his opinion, a significant increase in the outflow of methane from SW 1 at the same time as reducing the quantity of air flow to the working face in SW 2.

Despite Mr. Liney's opinion that a layer of methane leaking from SW 1 occurred at least intermittently even without a roof fall,¹⁰³ he concluded that the existence of a fall just prior to the explosion was a suggestion which, in his opinion, seemed entirely feasible and was difficult to refute. The effects of a fall in that area would, in his opinion, cause a methane layer to form within minutes.

For reasons which are not clear (and we did not believe it to be sufficiently important to determine) the Westray prosecution team did not meet with Dr. McPherson in May or early June 1998. Letters were written to both Dr. McPherson and to Mr. Muirhead on May 29, 1998. These letters are reproduced in Appendix "A", Tab 16 and Tab 17. They were clearly an attempt by the Westray prosecution team to determine if there was any support for a number of the notions espoused by Andy Liney on his trip to Halifax in May 1998, and set out in some detail in his letter of May 25, 1998.

Dr. McPherson replied on June 14, 1998, Ian Muirhead on June 20, 1998. As will be demonstrated, neither of these experts agreed with the propositions made by Mr. Liney. The questions asked and the responses by Dr. McPherson and Ian Muirhead are as follows.

Coal Dust/Stone Dust

The team wrote:

Anecdotal evidence and documentation from the Westray coal mine site indicate that a significant amount of gravel was put on the main drifts at Westray during 1991 and early 1992. Presumably when equipment traveled on the gravel roadways it created dust which settled on the floor and sides of the drifts.

(a) Would the gravel dust be visually distinguishable from coal dust?

¹⁰³ The Westray prosecution team had believed that Mr. Liney had been of the view that a layer of methane did exist from the area of the seals in SW 1 shortly after they were erected and the work into SW 2 began.

(b) If not, assuming the roadway samples pre and post-explosion have no evidentiary value, can we prove the relative percentage of gravel dust and coal dust?

Dr. McPherson

Dr. McPherson responded that the reference to a significant amount of gravel being put on the main drifts would be contrary to J. Dooly's¹⁰³ testimony at the Westray Commission of Inquiry where he describes his attempt to have gravel placed on the roadways, but that his suggestion was rejected by Roger Parry. Dr. McPherson suggested that if gravel had been used, unknown to Mr. Dooly, the times, places, and amounts of application should be ascertained. He stated that if gravel was placed, any dust generated would be infiltrated by coal dust to the extent that it would become very dark in colour. He concluded that the description by numerous witnesses as the mine being "black everywhere" was a result of excessive accumulations of coal dust.

He went on to answer that there are two methods of assessing combustible content. The first is that the colour of the dust gives a visual indication of its composition. In conditions where adequate stone dusting has occurred, the settled dust should have a light grey colour. The second method is by sampling and laboratory analysis of the dust. Given that the hypothetical scenario *required* pre and post-explosion samples to have *no evidentiary value*, he would know of no other means of proving the relative percentages of gravel dust and coal dust.

Ian Muirhead

In a lengthier answer, Ian Muirhead described the various types of gravel that had been purchased by Westray. He noted that the areas where the mine needed to improve the running surface of roadways was in the #1 and #2 slope as the tunnels passed from going through rock to coal. He

¹⁰³ Mr. Dooly was one of several "over men" a position having supervisory responsibility, taking instructions from the Mine Manager and Underground Manager.

noted several reports of shuttle cars and scoop trams getting stuck in the soft underfoot conditions, and in the period up to the end of 1991, gravel, sometimes referred to as fine gravel, was spread on the floor and compacted. He noted that in most cases, mention is made that the gravel was packed down, which would be the normal method, so as to create a hard smooth surface for the shuttle cars and other equipment to travel on. He was of the opinion that this compacting would trap any dust to the floor and would not make it available as a coal dust dilutant. His overall conclusion was as follows:

The fact that gravel was used for a while in the mine, and that gravel contains some unknown quantity of fine dust, is insignificant in terms of its possible contribution to control coal dust in the mine.¹⁰³

He also noted that, to be effective, any dust must be small enough to pass through a 200 mesh sieve.

He acknowledged that if one assumed that the roadway samples, both pre and post-explosion, have no evidentiary value, there was no way to prove the relative percentages of gravel dust and coal dust. He went on to note that there were too many unknowns involved. In these he included:

- the amount and size and composition of coal dust present when the gravel was put down
- the amount of fine dust in the gravel was not known
- the area over which the gravel was spread is not known, nor is the exact quantity spread
- most of the gravel was placed at least five months before the explosion took place and the areas over which it was placed would have been traveled over many times for further compaction

¹⁰³ June 20, 1998, p. 2.

His overall conclusion was: "The whole question of dust and gravel is a red herring and is not relevant to the effectiveness of the control of coal dust in the mine."¹⁰⁶

The next question asked had to do with Ian Muirhead's previous assessment that the quantity of stone dust purchased by the Westray mine prior to the explosion constituted evidence of a failure to adequately stone dust. Dr. McPherson and Mr. Muirhead were asked to deal with the proposition that the evidence would only be important assuming a normal ash content and applying the industry standard. They wished the experts to consider the additional information that the wash plant showed pre-explosion inherent ash levels as high as 65%, a sample from the shuttle car being 75%, and moisture levels in May 1992 reaching 10%. They also referenced the Suncor Feasibility Study, prepared by Norwest Resource Consultants, which had recommended a stone dust application significantly below industry standard. Given this backdrop, they asked what evidentiary value did the stone dust purchase have in proving the coal dust allegations.

Dr. McPherson

Dr. McPherson discounted the significance of the high ash content and moisture content levels. He would be more influenced by the inadequate level of stone dusting actually applied than by the amount of stone dust that the mine had purchased.

Ian Muirhead

In a more detailed assessment of the significance of the ash and moisture content, Mr. Muirhead also discounted that information and remained of the view that the quantity of stone dust purchased by Westray was extremely relevant to proving the allegations. He considered that the amount of stone dust available was woefully inadequate.

¹⁰⁶ June 20, 1998, p. 3.

The team forwarded to Dr. McPherson and Ian Muirhead the 1952 paper by Dr. Tideswell and asked various questions about the evidentiary value of the post-explosion dust samples.

Dr. McPherson

Dr. McPherson wrote that his *understanding* is that the post-explosion samples of dust taken at Westray were spot samples and not part of a detailed and well managed scientific investigation. He noted that that kind of examination was never carried out due to the hasty flooding of the mine which prevented reestablishment of ventilation and reasonably secure ground conditions. Therefore, the post-explosion dust sampling, according to Tideswell's recommendations, could not have been conducted. He noted that the dust samples taken on April 29 and May 8, are indicative of the high combustible content of the settled dust in the mine and consistent with the mass of testimony referring to physical conditions in the mine.

He explained the issue of preferential raising of coal dust as being a situation that may arise if the coal and stone dust are not well mixed, and particularly where the coal dust is present as a surface layer. He noted that Dr. Tideswell's paper was an excellent early example of an explanation of the mechanisms of explosions in coal mines, and that much of the material referred to in the paper had now been refined, quantified, and further demonstrated. Nevertheless, it provided a useful background in support of the Westray disaster as being a methane ignition leading to a fully developed coal dust explosion. He did not go on to discuss the issue of sampling.

Ian Muirhead

Ian Muirhead was generally supportive of the post-explosion samples that were taken by the RCMP. He acknowledged that no samples were taken from the roof. He concluded that "since the floor samples were taken and prepared in concordance with the requirements of the *Regulations*, they can be considered to be representative of the post-explosion conditions on the day of sampling

and the various roadways in the mine in which they were taken.

Mr. Muirhead had also noted, based on Dr. Tideswell's opinions, that the analysis of post-explosion samples would represent slightly better conditions in the roadways than were actually present at the time of the explosion.¹⁰⁷

Ventilation/Methane

The team asked Dr. McPherson and Mr. Muirhead to comment on what they called a "new causation scenario." This required the assumption that the fall at the #3 cross-cut just outside SW 1 did not occur as a result of the explosion but occurred before the explosion. The team asked the two experts to consider the impact of a fall on the extent of methane leakage from SW 1 and on the air flow into SW 2.

Neither Dr. McPherson nor Mr. Muirhead had enough information to calculate the exact effect of such a rock fall. They both agreed that such a fall would result in a reduction of the total amount of air flowing into SW 2. In addition, it would cause an increase in the air pressure differential across the stoppings into SW 1 which, in turn, would increase in the rate of leakage of methane.

Both were of the view that properly constructed, explosion-proof stoppings at SW 1 would have had a far greater resistance to leakage and would have greatly inhibited the methane outflow from SW 1. The increased methane flow from SW 1 due to such a fall, pre-explosion, coupled with the decreased air flow being supplied to SW 2, would increase the thickness of the methane layer entering the SW 2 district.

Coal Dust Explosion

The team asked both experts about their opinions written in March 1998 as to whether or not the

¹⁰⁷ June 20, 1998 Letter, p. 10.

coal dust must have exploded. They noted that one of the bases for the opinions offered was the degree of violence. The Westray prosecution team noted the reference in Tideswell's paper (at p. 160) which stated: "If there is more than 10% fire damp present in the air, such coal dust will not add appreciably to the extent or violence of the explosion."

They asked whether this additional information had an impact on their earlier opinion.

Dr. McPherson

Dr. McPherson responded:

D. Coal Dust Explosion

When a methane concentration exceeds and progresses beyond 9.7 per cent, the rate (and violence) of combustion decreases because of a reduced availability of oxygen. In technical terms, the mixture becomes 'fuel rich'. Adding yet more fuel in the form of coal dust exacerbates the situation. Hence, little increase in violence may be expected. It is this phenomenon that lies behind Dr. Tideswell's comment. There is no evidence, from the monitoring system or otherwise, that such a high concentration of methane existed in the North Mains prior to the explosion. It follows that the atmosphere in those entries contained the normal concentration of oxygen, fully available to feed the coal dust explosion.

(emphasis added)

Mr. Muirhead

Mr. Muirhead put Dr. Tideswell's comments in the same context: methane, at 10% of the available atmosphere, explodes, consuming all the available oxygen. He explained:

... At 5% when methane begins to be explosive, there is more than enough oxygen present in air and there is an excess available after the methane has been combusted (exploded) to allow any coal dust raised by the methane explosion to be also combusted and exploded. As the percentage of methane rises, more oxygen is required out of that present in the air until at 10% there is the perfect match of the exact amount of oxygen and methane for complete combustion and the most violent explosion. Beyond 10% methane concentration, there is not enough oxygen present to allow all the methane to fully explode, and by the time 15% CH₄ is reached there is not enough oxygen in the air to support any combustion or explosion.

This statement of Tideswell's also implies that for coal dust to not have any appreciable effect, there has to be a concentration of methane of 10% throughout the area affected by the explosion, i.e. all the damage was done by a methane only explosion from the presence of 10% methane throughout the whole of the mine. This is more unlikely. In fact if you refer to page 161, you will see the following statement by Tideswell:

"Thus it is unlikely that any long length of roadway will offer a continuously flammable firedamp-air mixture to an advancing explosion, unless it is uniformly fouled initially."

"These considerations provide one reason why explosions of firedamp do not usually spread as far as those of coal dust."

It is also true that a coal dust explosion, initiated by a small methane explosion but not assisted further by the presence of methane, can be equally if not more violent than a methane explosion, and once started, will continue to rampage through the mine as long as there is combustible material (coal dust). If there is some methane present as well, but below the 10% CH₄ level, then coal dust will add to the explosion of the methane and the violence will continue.

p. 17

(emphasis added)

It is, therefore, easy to conclude that Dr. McPherson and Mr. Muirhead did not agree with the logic of, or the significance of, the propositions advanced by Mr. Liney. This left the prosecution team in

a difficult position.

Recommendation to Terminate

As noted in our interim report dated June 16, 1999, the Westray prosecution team wrote to Martin Herschorn, Q.C., Deputy Director of Public Prosecutions, a letter dated June 19, 1998. This was the first official communication of the team's opinion that there was not a reasonable chance that a conviction would result if the charges of criminal negligence causing death and manslaughter against Gerald Phillips, Roger Parry, and Curragh Inc. proceeded to trial. A copy of this letter is reproduced in Appendix "A", Tab 18.

The letter is not lengthy. It refers to the June 19, 1992, Directive regarding the exercise of prosecutorial discretion. The operative paragraph in the letter states:

It is the unanimous opinion of Robert Fetterly, Robert McCarroll, G. Arthur Theuerkauf, and Marc C. Chisholm, that there is not a reasonable chance that a conviction will result if the charges of criminal negligence causing death and manslaughter against Gerald Phillips, Roger Parry, and Curragh Inc. proceed to trial. Having today, come to this opinion, in compliance with the Directive, we recommend that the prosecution be terminated. We understand that the earliest date at which you can meet with the prosecution team to discuss this issue is June 23, 1998. We will forward a summary of the reasons for our opinion on Monday, June 22, 1998 for your consideration. We look forward to meeting with you on June 23, 1998.¹⁰⁸

The letter is signed by the four remaining members of the Westray prosecution team.

¹⁰⁸ We should note that the letter refers to not just Gerald Phillips and Roger Parry, but to Curragh Inc. as well. There was some lingering uncertainty as to the exact legal status of charges against Curragh Inc., since Curragh did not appear at the first trial and was not specifically named in Justice Anderson's decision to stay the charges. In our opinion, for the purposes of our review, nothing turns on this legal uncertainty.

On June 22, 1998, a letter was sent to Mr. Herschorn signed by Mr. Chisholm recommending that a Stay of Proceedings be entered with the indication that the Crown would not recommence proceedings in the future. Neither in the letter of June 19, nor in the one of June 22, 1998, did the team specify what test they were employing to arrive at the conclusion that there was not a reasonable chance of conviction. However, based on our interviews of all of the members of the second prosecution team, they did not resolve the issue as to whether they would apply a test of substantial likelihood of conviction or of a reasonable chance of conviction, that is, whether or not this required an opinion that the likelihood of conviction was more likely than not (i.e. the 51% rule). They came to the conclusion that, based on the evidence then available to the Crown, at the end of the Crown's case it would be virtually inevitable that a trial judge would have a reasonable doubt, and therefore be required to acquit.¹⁰⁸ *Having come to this conclusion, the Crown's case would not pass the sufficiency criteria of any prosecution service in Canada.*

In our introductory remarks to this Report, we identified our approach as being one of not judging by hindsight. We would only be critical of an assessment or conclusion *which was unreasonable at the time it was made*. This same approach was identified in our interim report of June 16, 1999, with respect to our examination, at that point in our review, of the propriety of the exercise of the Crown's discretion. We stated, and we reiterate now, that it is a fundamental principle in both civil and criminal law that the exercise of a discretion ought not to be interfered with absent a conclusion that the discretion was exercised in bad faith, for an improper motive, or that the decision was made on some wrong principle.

¹⁰⁸ This analysis takes as a given that either the defence made a decision to call evidence thereby buttressing the problems of proof that they considered inherent in the Crown's case or the defence called no evidence. In either instance, the standard of proof beyond a reasonable doubt would be the requisite test.

It is, of course, trite law, that a trial judge has no power to acquit an accused at the close of the Crown's case because of reasonable doubt unless the accused has elected not to give evidence. In the absence of that election, an acquittal could only occur on the basis of a motion for a directed verdict. Such a motion can only be successful on the basis that there is no evidence upon which a reasonable jury [or judge] properly instructed, could return a verdict of guilty. There need only be *some* evidence on every essential element of the offence charged. See *R. v. Morabito* (1949), 93 C.C.C. 251 (S.C.C.); *The United States of America v. Shephard* (1977), 30 C.C.C. (2d) 424 (S.C.C.); *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193 (S.C.C.), and more recently *R. v. Charemski* (1998), 123 C.C.C. (3d) 225 (S.C.C.).

We confirm that we are well satisfied that there is no evidence of bad faith or improper motivation or that the Crown took into account irrelevant factors or ignored relevant ones. We do have some concerns about the factual and legal accuracy of some aspects of the letter of June 22, 1998, which we will identify later. *However, it is our overall opinion that the errors did not have an impact on the conclusion that the team reached.*

Letter of June 22, 1998, to Martin E. Herschorn, Q.C.

The letter is four pages long. A copy of this letter is in Appendix "A", Tab 19. It appears that the letter was initially drafted by Mr. McCarroll. The only members of the team who reviewed the letter were Mr. Theuerkauf and Mr. Chisholm.¹⁰⁰ The letter is stated to be a brief summary of the legal and factual basis for the team's conclusion. The basis for each of the propositions that the Crown relied on in providing its summary of reasons is attributable to the opinions of Andy Liney. They fall into two broad headings: the ventilation case and the coal dust case.

Ventilation

The letter set out the prosecution team's belief prior to January 1998 that identifying the particular source of ignition in the SW 2-1 roadway was not essential to proving the Crown's case. However, at the meeting with the experts in January 1998, the prosecution learned that identifying the particular source of ignition was a crucial issue with respect to proving criminal negligence causing death. One of the experts advised the team that if the continuous miner was the source of ignition, it seriously weakened the Crown's case.

In addition, the team referred to the possibility that the "mathematically hypothesized" layer originating outside the SW 1 gob did not always exist up the SW 2-B road and into the workings. There would, therefore, be times that attempts to detect a methane layer, if any such attempts were

¹⁰⁰ Mr. Fetterly was away on leave until approximately June 30, 1998.

made, would have been futile. It created the possibility that the methane layer did not exist at the time of the explosion or, if it did, it did not actually extend to the SW 2-1 area, where all experts agree the initial ignition of methane occurred.

The team came to the realization that if the continuous miner was a possible source of ignition, there was the possibility that the source of methane that was ignited and exploded came from the working face or from some other place exclusive of the SW 1 gob, and that the primary *ignition* of methane from such other sources could have resulted from conduct other than criminal negligence on the part of the accused.

The only expert who expressed any of these views was Andy Liney.

The team then wrote:

A further scenario raised by an expert suggested that a roof fall in the intake airway to the working faces of the SW2, prior to the explosion, could have resulted in additional methane being drawn from the SW1 gob and mixing with the intake air reaching the working faces of the SW2. As well, such a roof fall would have reduced the airflow to the SW2 thus increasing the probability of a methane layer reaching the SW2 from the SW1 gob. The Crown is unable to determine whether this roof fall occurred just prior to or subsequent to the explosion. If occurring just before the explosion we are advised that the two accused would likely not have appreciated the possible tragic consequences of such interference with the ventilation circuit, (i.e. resulting in a rapid liberation of methane from the SW 1 gob due to pressure differential) other than it would slow or halt production at the working faces of the SW2. The lack of such sophistication on the part of the Manager and Underground Manager, we are advised falls short of criminal negligence.

First of all, there is absolutely no evidence that the roof fall that was discovered on May 10, 1992, actually occurred prior to the explosion. It can be argued that any opinion based on a scenario that has no evidentiary foundation is speculative and ought not be considered. On the other hand, the burden of proof in a criminal proceeding is on the Crown and if the existence of facts can impact on the weight, and even admissibility, of expert opinion, the Crown must be able to resolve the factual uncertainty.

The more fundamental difficulty with the roof fall scenario at #3 cross-cut is that even without a fall at that location, the experts, including Andy Liney himself, were always firmly of the view that there was a methane layer from SW 1 up to and into the SW 2-1 roadway. The only divergence of opinion between Messrs. McPherson, Muirhead and Andy Liney was whether or not this source of methane was the one that was initially ignited. All were in agreement that this methane layer did have a contributory role in the ultimate explosion by first being mixed into the general body or atmosphere and exploding, which then triggered a coal dust explosion.

The prosecution team noted that the two accused would not likely have appreciated the possible tragic consequences of such an interference in the ventilation circuit. This comes close to the application of a subjective test, that is, what the accused *knew* rather than an objective standard as to what a reasonably competent mine manager ought to have known and whether or not the conduct of Phillips and/or Parry fell below that standard to such an extent as to constitute wanton or reckless disregard for the lives or safety of the miners. There are certainly comments in Mr. Liney's last opinion, dated June 18, 1998, that refer to what an average mine manager may or may not appreciate, which is, of course, the appropriate objective standard.

The team then identified the issue of tampering with the methanometer and the reliance that the defence could place on it. They wrote:

It is most likely that the two accused, in response to the preceding fact scenario, would rely on the SW2 continuous miner (the most obvious possible

source of ignition) automatically ceasing to cut coal once the methane concentration reached 1.25% or 1.5%; far short of the 5% minimum explosive concentration for methane. As well, the accused will certainly raise the fact that evidence of tampering with the methane sniffer on the continuous miner in SW2 may explain why there was an ignition of methane by the continuous miner as opposed to the continuous miner ceasing to cut coal in an explosive atmosphere.

The issue of tampering with the methanometer, and its impact, came strictly from Andy Liney. In our opinion, it is a red herring. First of all, it ignores the fact that the Crown had at its disposal, whether it stood up in cross-examination or was ultimately found as a fact, that one of the accused, Roger Parry, ordered that the methanometer be tampered with. This evidence was to come from two sources. Secondly, there was likely to be evidence that a number of the miners used what was called the "override button," sometimes referred to as the "test button," to cause the continuous miner to continue operating in circumstances where the methanometer would ordinarily cause it to shut off at concentrations of methane commencing at 1.25%.

Coal Dust

The letter of June 22, 1998, referenced the discussions in January 1998 and following with the experts. It then stated:

Further discussions with these experts revealed that there was less than certainty as to the involvement of coal dust in the explosion, and if it were involved, the significance of that involvement as it related to the death of the miners.

(emphasis added)

There is no doubt that the Crown needed to prove beyond a reasonable doubt that coal dust exploded and that that explosion caused or contributed to the deaths of one or more of the miners. Proof beyond a reasonable doubt does not mean proof beyond *any* doubt.

The only expert who expressed room for doubt about the involvement of coal dust in the explosion was Mr. Liney. While saying that he was of the opinion that the coal dust did explode, he felt he could not say so beyond a reasonable doubt.

In relation to the coal dust case, the letter also stated:

As previously mentioned, the prosecution had believed there was sufficient evidence to prove that the explosion of non inerted coal dust played an integral part in the deaths of the miners. We have been advised that sampling of this dust pre and post explosion is of little, if any, assistance in proving the degree of combustibility of that dust at the time of the explosion. The prosecution will also have difficulty in proving there was an excessive accumulation of coal dust due to the extensive use of gravel in the #1 Main. This gravel would likely have been pulverized by heavy equipment traveling regularly in the #1 Main with the result that it would be mixed unrecognizedly with whatever coal dust was present.

We have been advised by an expert that the Westray explosion could have been entirely a methane explosion, or if coal dust was involved, that it would play no significant role in the magnitude or effect of the explosion if the methane involved was at a concentration of 10%. Without proof beyond a reasonable doubt that insufficiently inerted coal dust played an essential role in the magnitude of the explosion which killed the miners, the manslaughter charges will be dismissed by the Court.

The only individual who expressed any of these thoughts was Mr. Liney. He is the only one who stated that sampling of the dust pre and post-explosion was of little, if any, assistance in proving the degree of combustibility of dust at the time of the explosion. Likewise, it was Mr. Liney alone who

made any reference to difficulties posed by the purported use of gravel in the #1 main.¹¹¹

Lastly, it was also only Andy Liney who even raised the possibility that the explosion at Westray could have been entirely a methane explosion.

There is an obvious lack of precision in the language used. It referenced having to prove beyond a reasonable doubt that sufficiently inerted coal dust played an *essential* role in the magnitude of the explosion. From the review of the law that we have set out earlier, in our opinion, the Crown need only prove that insufficiently inerted coal dust was a *contributing cause outside the inconsequential range* in the deaths of one or more of the miners.

From our discussions with Marc C. Chisholm, Q.C., and others concerning the language used in the letter of June 22, 1998, we are satisfied that although there were errors in the language used regarding the burden on the Crown, the members of the team were well aware of the appropriate standard and that the misstatement should be viewed as a harmless error. In other words, it would not have affected the opinion the members arrived at.

The Westray prosecution was an extremely complicated undertaking. There was a myriad of legal and factual issues. Many of them had no "right answer." Many of the legal issues depended on the application of sound legal reasoning. On the other hand, many of the factual issues could not be adequately resolved. There were many unanswered questions. The reason for such factual uncertainty can be traced to a variety of factors which we will identify later.

In our opinion, it was neither the legal uncertainties nor the factual ones that lead the Crown to its ultimate decision to terminate the prosecution. It was the belief of the members of the team that if they called Andy Liney as a witness for the Crown at the trial, his evidence would create a reasonable doubt. In our opinion, it is an appropriate and necessary task for the Crown to assess

¹¹¹ As we note later, the evidence available to the Crown in no way supports the statement that there was "extensive use of gravel in the #1 main."

the reliability and credibility of witnesses when considering the sufficiency of evidence threshold.¹¹² From our discussions with the remaining members of the Westray prosecution team, it is apparent that they did not necessarily accept the validity of Mr. Liney's opinions. However, they were not prepared to discount them either.

In our opinion, but for the opinions of Andy Liney espoused in his letters of March 24, April 1, May 21, May 25, 1998, the Crown would have remained of the view that there was indeed a reasonable likelihood of conviction based on the premise that it was more likely than not that a conviction would be entered had the charges proceeded to trial.

As noted in our interim report of June 16, 1999, the Crown was in a very difficult position given the opinions communicated to them by Mr. Liney. All of this material would have to be disclosed to the defence. If Mr. Liney was called as a witness, and was actually qualified as an expert witness beyond being a ventilation specialist, the Crown's assessment that his evidence would create a reasonable doubt was not an unreasonable conclusion.

The only other broad option¹¹³ open to the Crown would have been to abandon Mr. Liney as a Crown witness. This was a step the Crown could have taken at various stages throughout the file. Indeed, in December 1997, Mr. Liney took the view that if Dr. McPherson was called as a Crown witness, he would not appear. Being a resident of the United Kingdom, the Crown had no power to compel his appearance.

¹¹² See, for example, the discussion in The Martin Report and the Law Reform Commission of Canada's Report, "Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor." Working Paper 62 (November, 1990), p. 79. This approach is specifically approved in the B.C. Charge Approval Guidelines, The Saskatchewan Policy and Practice Directive; The Ontario Crown Policy Manual (Objective Criteria Only); New Brunswick Department of Attorney General, Criteria for Prosecutions; Newfoundland Department of Justice, Crown Attorney's Handbook (Topic #300).

¹¹³ It is certainly conceivable that the Crown could have called Mr. Liney and qualified him only as a ventilation expert and opposed any motion by the defence to have him qualified to speak in relation to issues involving coal dust. While this option may be theoretically possible, it flies in the face of the fact that the Crown asked him for his professional opinion on such matters. In addition, while Mr. Liney's qualifications do not show him to be a specialist on coal dust, he does have, in our opinion, sufficient education, training, and experience to have some knowledge in the field.

However, once Mr. Liney produced his opinions, commencing with his letter of March 24, 1998, the prosecution had a real difficulty. While the Crown has a broad discretion as to what witnesses it calls at trial,¹¹⁴ it is not an absolute discretion. An improper exercise of it can result in a finding of an abuse of process.

As noted in our earlier comments, the dissenting Justices in the Supreme Court of Canada were blunt in their assessment of the conduct of the Crown prior to and during the first trial. They concluded that the entire conduct of the Crown brought the administration of justice into disrepute and constituted a violation of the accused's rights under s. 7 of the *Charter*. They would have upheld the original stay of proceedings entered by the trial judge. In this context, one of their concluding comments bears repeating:

The present case is not simply about Crown non-disclosure. This case is about the appearance of justice. Throughout the proceedings the Crown bent and broke rules, and attempted to cover up when it was caught. The Crown actively misled the court, on a number of occasions. The Crown ignored or failed to obey court orders. It is unnecessary to repeat the litany of abuses that have already been described. The entire proceedings were tainted by prosecutors who were playing to an enraged public, and playing to win. That this is apparent can be seen from the internal memo that passed between prosecutors referred to by the trial judge and in these reasons. To win is not the role of the prosecutor, to win at all costs is an affront to the Canadian justice system. Courts should not tolerate activities which demonstrate this attitude. The conduct of Crown counsel at the trial violates the fundamental principles that underlie the community's sense of fair play and decency and constitutes an abuse of the court's process.

per McLachlin and Major JJ.
(1997), 113 C.C.C. (3d) 481 at p. 517

It was known that the defence would bring applications at the new trial to stay the proceedings based on allegations of abuse of process and/or violations of their clients' rights under s. 7 and

¹¹⁴ *R. v. Cooke* (1997), 114 C.C.C. (3d) 41 (S.C.C.).

11(b) of the *Charter*. It was therefore recognized that all aspects of the Crown's handling of this prosecution would again be under the microscope. Not only might the Crown have to deal with the fall-out of the communications written by Mr. Hagell on October 29, 1997,¹¹⁵ but a decision by the Crown to abandon Mr. Liney as an expert would be seen as cogent evidence that the Crown was still "playing to win" rather than completing its mandate to ensure that accused persons are treated with fairness. It could be viewed as contrary to the principles that exist that guide the conduct of every Crown Attorney. The most oft quoted statement of those principles is that of Rand J. in *Boucher v. The Queen* (1954), 110 C.C.C. 263 (S.C.C.), where he stated (p 271):

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Relationship with the Attorney General

As already noted, the Westray prosecution team wrote to Mr. Herschorn on June 19, 1998, formally communicating its opinion that there was not a reasonable chance of conviction and recommending that the prosecution be terminated.

¹¹⁵ Ordinarily we would have little difficulty in concluding that Mr. Hagell's memorandum to the team and his letter to Mr. Pitzul of October 29, 1997, need not be disclosed. It would constitute work product, if not a confidential and privileged communication. However, it is at least arguable that this characterization could change if the Crown's motivations for pursuing the case became relevant, as was likely in the face of a well-phrased application by the defence under the *Canadian Charter of Rights and Freedoms*.

This letter was not received by Mr. Herschorn until June 22, 1998.

From our discussions with the various members of the Westray prosecution team and Mr. Herschorn, it is obvious that Mr. Herschorn was aware for some time that the team intended to recommend a termination of the prosecution on the basis that there was not a reasonable chance of conviction. Nevertheless, this was the first formal communication of this conclusion.

Mr. Herschorn immediately wrote to Mr. Chisholm on June 22, 1998. He asked that Mr. Chisholm forward a summary of the reasons for the team's opinion and requested that he receive it no later than June 23, 1998. A copy of this letter is reproduced in Appendix "A", Tab 20.

Mr. Herschorn expressed his intention to request a meeting with the Minister of Justice. He did not anticipate that it was feasible for the Minister to issue a Directive to the Service on this prosecution given that the opinion about terminating the prosecution was based on the absence of a reasonable chance that a conviction would result if the case proceeded to trial.

Mr. Herschorn requested recommendations on how the Crown's decision should be communicated to the various stake holders. The recommendations were to include a detailed time table on communicating the decision.

On June 24, 1998, Mr. Herschorn wrote to the Attorney General and Minister of Justice, the Honourable Dr. Jim Smith. A copy of this letter is reproduced in Appendix "A", Tab 21. Attached were the letters from the team and from Mr. Chisholm dated June 19 and 22, 1998.

Mr. Herschorn requested an opportunity to meet with the Attorney General to discuss the decision to terminate the prosecution.

This meeting was held late in the day on June 24, 1998. Present were Dr. Smith, Mr. Herschorn,

and Mr. Chisholm. We have since confirmed the details set out in our letter of June 16, 1999. Dr. Smith did not seek to question the recommendation of the Westray prosecution team, nor the intended exercise of discretion by the Deputy Director of Public Prosecutions to terminate the prosecution by the entry of a stay of proceedings. The position of the Attorney General was that he was prepared to rely on the Crown Attorneys' professional judgment. He had neither the expertise, theoretical framework, or information to question the judgment being presented to him. There was, in essence, an indication that he would not intervene in the prosecution.

We had earlier expressed that, in our opinion, the letter of June 22, 1998, was an inadequate basis for the then Attorney General, or any Attorney General, to knowledgeably and, if necessary, independently, exercise his or her common law or statutory powers. Indeed, it is our opinion, that it was an inadequate explanation by the team to the Director of Public Prosecutions.

The stay was entered on June 30, 1998. The stay and the letter to counsel representing Messrs. Phillips and Parry are set out in Appendix "A", Tabs 22 and 23. The letter is short. It informed the defence that the Crown had determined there was not a reasonable chance of conviction and have therefore entered a stay of proceedings. The letter also advised that the Crown would not be recommencing proceedings on the indictment.

The rationale given by the Westray prosecution team members on the lack of detailed reasons being communicated to the Deputy Director of Public Prosecutions and to the Attorney General was out of concern that the accused not consider themselves in jeopardy on these charges once the Crown had come to its position that there was not a reasonable chance of conviction. The team anticipated, indeed it was announced publicly, that a report would be prepared by the Westray prosecution team setting out their work since 1995 and providing detailed reasons for their conclusion. This work was pre-empted by the announcement by the Honourable Dr. Jim Smith of the Honourable Fred Kaufman's appointment to inquire into the Public Prosecution Service, which ultimately included this review of the handling of the Westray prosecution.

In our opinion, it was up to the Attorney General, should he wish it, to request detailed reasons and to informally, or formally if necessary, delay the entry of a stay of proceedings pending receipt of those reasons. *There is absolutely no basis to suggest that any members of the Public Prosecution Service or the Attorney General were not acting in good faith in the preparation of the Summary of Reasons dated June 22, 1998, and the reliance placed upon that letter.*

It is further our opinion that the approach taken by the Attorney General, and by members of the Public Prosecution Service, is symptomatic of the lack of clarity, then existing, in the relationship between the Attorney General and the Public Prosecution Service. It is this very lack of clarity that may well have lead the Honourable Dr. Jim Smith to seek guidance of how the issues of independence and accountability work in theory and in practice as between the Public Prosecution Service and the Attorney General. Mr. Kaufman identified in his final report the uneven practice about the relationship between the various Attorneys General and those that have held the office of the Director of Public Prosecutions. This lead to his recommendation that the *Public Prosecutions Act* be amended to require regular meetings to discuss policy matters, as well as existing and contemplated major prosecutions.

Since the Attorney General is the chief law enforcement officer in the Province of Nova Scotia and is, as such, accountable to the public through the legislature for the Public Prosecution Service, it would have been far better for the administration of justice had detailed reasons been provided to the Minister. The ultimate result may well have been the same, but it would have allowed the Attorney General the opportunity to be properly informed about the largest and, many would say, the most significant criminal prosecution in the history of Nova Scotia. Failing to properly inform the Attorney General is to render illusory his or her role as the chief law enforcement officer and final arbiter as to the public interest.

SECTION V: SUBSTANCE OF THE DECISION

At the outset we stressed that it should not be our role to second guess the decisions made by the Crown. Only if a decision was unreasonable would we offer criticism. There were many decisions made by the first trial team and by the second prosecution team, and by their superiors, that if they had to do over again, they may well use a better approach to the problems that faced them. We intend to identify some of those problems and offer our opinion on how they can be avoided in the future.

In relation to the exercise of the Crown's discretion to terminate proceedings, keeping in mind the appropriate principles and reviewing the exercise of a discretion, we reported in our letter of June 16, 1999, our opinion that we could see no clear basis to interfere, or recommend interference, in the exercise of the discretion that was recommended by the second Westray prosecution team, and accepted by the Deputy Director of Public Prosecutions and the Attorney General in June of 1998.

It is our view that the essential reason for the Crown's recommendation were the opinions offered by Andy Liney commencing March 24, 1998. We had not met or spoken with Mr. Liney at the time of our interim report of June 16, 1999. However, in reviewing the many hundreds of pages of materials written by Mr. Liney since 1994, we had serious concerns about the correctness of the opinions that he espoused in March through June 1998. We identified a number of internal inconsistencies, not to mention contradiction, by other experts. We were encouraged by some members of the Westray prosecution team to meet with Mr. Liney so that we could assess first hand his opinions and the basis for them.

We consulted with Mr. Kaufman about the utility of further exploring the merits of the reasons for the termination of the prosecution. It was decided that if indeed we could be satisfied that Mr. Liney's opinions were correct, this could provide irrefutable assurances to the public about the decision to terminate the prosecution.

We made the necessary inquiries to set about assessing Mr. Liney's opinion. We made arrangements for Mr. Liney to meet with us in Halifax on June 28, 29, 1999.

Before dealing with what we learned from these meetings, it is useful to set out some background.

Background

A list of names of potential experts was provided to Christopher W. Morris in January 1993 by officials from the Cape Breton Development Corporation (DEVCO). Included in that list, as one of the world's leading ventilation experts, was Mr. Liney. Herman C. Felderhof and S/Sgt. Ches MacDonald went to England in January 1994 to meet with Mr. Liney to explore the possibility of retaining him as a ventilation expert. They were impressed with his knowledge and expertise.

By the time they arrived back in Halifax, Mr. Liney had already produced a 26-page report.¹¹⁶ This was followed by a 45-page second report on March 25, 1994, on ventilation aspects of the Westray explosion. The information in the two reports was then consolidated into a third report of approximately 66 pages sent in August 1994.

During the first trial, Mr. Liney was forwarded the transcript up to May 1, 1995, for his review and comments. He also provided written commentary on the reports of the other Crown experts, Kenneth Richmond and Dr. Paul Amyotte.

While it may not have been obvious at the time, Andy Liney's role became far more than that of simply providing expert opinion evidence on ventilation matters. He became an important advisor to the first team. Reliance on Mr. Liney started to increase just prior to the first trial. His role became that of not only a consultant about coal mining, but a consultant on virtually all aspects of the prosecution case, both technical and in relation to the lay witnesses the Crown intended to call.

¹¹⁶ They met on January 24, 25, 26, 1994. The report was faxed to the Crown on February 2, 1994.

This reliance on Mr. Liney increased during the second prosecution effort. As we noted in the section dealing with the early work by the second prosecution team, its members met for upwards of one week in January 1996 with Mr. Liney who briefed them on coal mining matters. Throughout 1996 the team continued to consult with Mr. Liney. They had him comment on statements of certain witnesses. They met with him in September 1996 and he attended the Westray mine site. They forwarded to him the complete transcript from the Westray Commission of Inquiry and sought his assessment. He provided that assessment in a 276-page report on February 21, 1997. He produced a further 48-page report on February 27, 1997, on the RCMP photographs of the mine.

He provided further brief reports on issues related to some of the physical evidence and the ducting used at the mine. Lastly, he provided extensive written commentary on or in response to Dr. McPherson's and Don Mitchell's "critique" of his inquiry testimony.

Mr. Liney has a degree in mining and is qualified as a mine manager. He eventually became a specialist in ventilation and held high office with British Coal with responsibility for ventilation. In December 1992 he left British Coal and became a self-employed ventilation consultant.

Meeting with Andy Liney: June 28-29, 1999

There were a host of issues that we intended to cover with Mr. Liney during our meetings. They centred around the basis for the opinions he expressed from March to June 1998, which caused the Westray prosecution team to recommend discontinuance of the prosecution. We also wanted to know when it was that he formulated these opinions. In matters related to ventilation, we intended to give appropriate deference to Mr. Liney's expertise, while at the same time exploring the basis for his opinion. In relation to coal dust matters, we wanted to determine the basis for his opinion and what qualifications he had to offer it.

Mr. Liney was forthright in acknowledging that he is not a coal dust expert. However, as a mine manager and ventilation specialist, he does need to be aware, and is aware, of the dangers of coal dust, the need to have a regular sampling program in place, and what means are available by stone dusting, water or stone dust barriers, to control a coal dust explosion. With respect, we are not at all satisfied that Mr. Liney had any real expertise to offer an opinion as to whether or not the samples taken pre and post-explosion had value in proving the degree of combustibility of the mine dust at the time of the explosion.

We asked Mr. Liney for the basis of the opinions he had offered to the Crown that the placement of gravel on roadways would pose difficulties in proving that the inert levels failed the statutory requirement or that gravel dust would hinder the Crown in proving that there was an excessive accumulation of coal dust.

He advised us that the issue of gravel on the roadways was overplayed and that it was his intention that the gravel documentation in the ventilation binders was to be pursued; not that it was ready to be advanced as a reason for discontinuing the prosecution. We asked Mr. Liney for the reference in the ventilation binders that led him to make any comment with respect to gravel on the roadways. His notes indicated that he relied on document 401100 in volume 49, headed "Other Dust Control Measures." This document is reproduced in Appendix "A", Tab 24. Mr. Liney confirmed to us that he relied on no other documentation or information.

As one can see from the document, it consists of 8 pages. It was marked as an Exhibit during the first trial (Ex. #1215). It came into the possession of the RCMP (identifier numbers Q & A 12-70, RCMP Exhibit #670) in August 1994. It was sent to S/Sgt. Ches MacDonald by Ian Muirhead under cover of a letter dated August 10, 1994. This document had been supplied to Mr. Muirhead by Westray during his investigation for the insurers. It appears to be a post-explosion explanation drafted by Curragh Inc. as to efforts that it claims it undertook to control coal dust in the mine.

The reference to gravel is brief:

OTHER DUST CONTROL MEASURES

- *during the development of the mains, 2" to 4" of road gravel was placed as a running surface in the mains. A lot of the dust in the mains was apparently made up of degraded road gravel.*

Document 401100
Exhibit #1215 p. 6

We do know that Marc C. Chisholm, Q.C. met with the RCMP investigators, Sgt. Brian Wride and Cpl. Terry Kelloch on June 15, 1998, and requested they investigate the issue of what gravel, if any, went underground at the Westray mine. Sgt. Wride interviewed employees of Satellite Construction, the firm that would have been responsible for bringing gravel on site. The information that was obtained on June 16, 1998, was that the bulk of the gravel was used on the surface and very little used in the tunnels. Their queries certainly did confirm that some gravel, albeit very little, was used in the #1 main from the surface to #5 cross-cut and even some in the north mains.¹¹⁷

In our opinion, it is plain that there was no evidence in the ventilation binders that could reasonably be viewed as providing a reliable basis to say that there was extensive placement of gravel in the roadways.

Contrary to Mr. Liney's statements to us on June 28, 1999, that he identified the placement of gravel on roadways as something that needed to be investigated, he had written:

¹¹⁷ The results of these inquiries were reported to Mr. Chisholm on June 17, 1998. When this information was reviewed with Mr. Chisholm in December 1999, he acknowledged that the adjective in the letter of June 22, 1998, "extensive" in referring to the use of gravel in the #1 main" was incorrect. All members of the second prosecution team involved in the recommendation to discontinue the prosecution were of the view that the issue of gravel in the mine was not that big of a concern. Their final conclusion would have remained the same.

... Furthermore, my recent reading revealed that the floors of the main slopes had been covered with road gravel presumably for consolidation purposes, but this gravel had degraded over time with vehicle wear and effectively disappeared. ...

May 25, 1998, p. 4

... I have previously suspected that this consisted of fine coal dust from the #1 slope floor, ground up by vehicle movement and carried by the ventilation until it reached the relatively more sluggish zone after the main air split. However, because of the information now available relating to the importation of gravel into the slope, it is now more difficult to demonstrate that this area might have been non-inertised coal dust.

May 25, 1998, p. 5
(emphasis added)

The Westray prosecution team also relied on Mr. Liney for the conclusion that there may not be sufficient evidence to prove that non-inert coal dust contributed to the deaths of any of the miners. In essence, the explosion could have been entirely one of methane. Throughout the period March - May 1998, many members of the Westray prosecution team viewed Mr. Liney as having changed his opinion. Mr. Liney bristled at this suggestion. He advised us in our meetings that as far back as 1995 he had advised the police and the Crown that the "coal dust issue" would not fly and advised them to abandon it. In our discussions with the police and all members of the first Westray prosecution team, they are adamant that Mr. Liney said no such things to them. We have examined the personal notes and team notes from the first prosecution effort. There is no reference to such a comment. There is no correspondence of any nature setting out that view by Mr. Liney.

As noted earlier, we have examined the notes that were made available to us from all team members of the second Westray prosecution team and the correspondence files. Although there is no correspondence up to Mr. Liney's letter of March 24, 1998, supporting the possibility that there was not a coal dust explosion in the north mains, we have noted that Mr. Liney did raise the issue in

a meeting in September 1996. According to the notes available to us about that meeting, Mr. Liney raised issues as to how reliable descriptions were of damage in the north mains and the suggestion, attributed to Mr. Liney, that the team must obtain conclusive evidence of greater damage in the north mains to be able to definitively state that there was a coal dust explosion.¹¹⁸

Mr. Liney's initial reports contain lengthy commentary and critique of the ventilation and mining practices at Westray.

However, after reviewing many statements made by Mr. Liney in his testimony at the Westray Commission of Inquiry and in written materials to the Westray prosecution team, it would be unreasonable to conclude anything other than that he had indeed changed his opinion.

In March - May 1998, Mr. Liney came to be of the view that the devastation and deaths of the miners in the north mains might not have been from a coal dust explosion. He mentioned that a body of methane from the SW 1 may have been ejected and pushed into the north mains and then became reignited.

At the Westray Commission of Inquiry, Mr. Liney, testifying under oath, gave his opinion on the initiation and propagation of the explosion. He stated:

On the evidence of the - - so far we have talked about relatively little violence in this area. But on the evidence of witnesses, even though there is no pictures, the violence was considerably greater in here. And there is no way that the gas from here transferred to this point and reignited in a larger volume.

So in my opinion, the only rational explanation for the continuation of the explosion at an enhanced rate, this gassed explosion would have sent the products in here, make no mistake, and done a bit of damage, but would have been on an ever decreasing basis, not an ever increasing basis.

¹¹⁸ It also appears that Mr. Liney was requesting a complete summary of all coal dust samples, including location, date taken, and method of taking. This apparently was not done.

So it refueled itself somewhere in bye of #10 cross-cut, in an area which I understand from witness reports most people commented as being one of the worst pieces of coal dust in the mine. And I think maybe a coal dust ... well, for definite a coal dust - explosion started there.

(emphasis added)

Westray Commission of Inquiry, p. 3315¹¹⁹

• Other evidence of a change in his opinion can be found in the following sources:

- In Mr. Liney's review of days 1-27 of the first trial he notes that the defence appeared to be attempting to prove that a coal dust explosion did not take place. He confirms his opinion that the coal dust explosion [as opposed to other experts who identified it as occurring as early as the SW 2-B roadway] was confined to the #1 main area and into the north workings. He also disputes entirely a witnesses theory that you cannot recognize coal dust from visual examination. Indeed, his input is that the colour of the dust can, to an experienced individual, can to accurate predictions of the testing results on such dust.
- We may also continue to disagree in how far into the north mains the explosion continued to refuel, although again the difference is slight when Dr. McPherson's testimony is studied, but this is less important as to the coal dust explosion certainly resulted in the devastation and injury in the north mains in any event.

(Mr. Liney's comments re: Dr. McPherson's review: December 16, 1997, p. 27)

¹¹⁹ He confirmed his opinion that it was a coal dust explosion at p. 3599, in bye the #10 cross-cut.

- In the question/issues for discussion circulated for the meetings of January 12-13, 1998, Messrs. Liney and Muirhead and Dr. McPherson were asked questions about their opinion on there having been a coal dust explosion. The questions, and Mr. Liney's responses, were:

(XI)(a) What facts caused you to believe that there was a coal dust explosion?

The absence of an obvious alternative fuel in the north mains despite the obvious devastation there. The degree of damage in the north mains indicative of very high levels of violence associated usually with a coal dust explosion. The fact that #1 main between 10 and 11 cross-cuts was reported by many witnesses as being a focus of very severe coal dust (compared to other locations).

(XI)(b) Within what area are you certain that a coal dust originated and within what area are you certain it terminated?

I am sure that no coal dust explosion incurred in or in bye of SW 2-B due to the almost total absence of significant damage here. RCMP photographs of SW 2-B clearly show the conveyor disturbed only by being run off the jib end due to this being pushed to the rib side (by the methane explosion of SW 1) and no other damage. (#252, #253, #254, and #256). The damage in B and C-1 road was severe but not beyond what could be attributed to the large methane explosion from SW 1. However, the "run up" argument is the determining factor as to whether it is accepted that a coal dust explosion started here. The evidence of unburned paper bags and the roof in 1 north main in bye 10 cross-cut might be taken as implying it was still a methane explosion at this point (due to the transient nature of a methane flame compared to the long burning zone associated with a coal dust flame). There is little doubt that it was a coal dust explosion from this point in bye ...

(emphasis added)

However, it is also our opinion that some of Mr. Liney's conclusions on ventilation matters that

lead the second Westray prosecution team to the conclusion that there was not a reasonable likelihood of conviction, were known, or should have been known, to the team before the spring of 1998. In particular, Mr. Liney's opinion about the existence of a methane layer from outside the seals of the SW 1 panel (the gob) up the SW 2-B road and into the working areas of the SW 2 panel. Mr. Liney had testified at the Westray Commission of Inquiry, in language that may have been somewhat confusing, that there may have been days when the layer did not exist. He described it as being a phenomenon of a persistent, maybe not continuous, but continual occurrence of a methane layer from SW 1 to the SW 2-1 area.¹²⁰

However, in other matters of substance, Mr. Liney did indeed appear to change his opinion. The best example is the issue of the stoppings or seals at the SW 1 panel.

His initial descriptions of these seals were that they were "total folly."¹²¹

At the Westray Commission of Inquiry, Mr. Liney described the operation of the mine in graphic and clear terms, including the issue of the seals:

Well, my gut, instinctive human reaction is that it is just an absolute unbelievable disgrace. It's - - I don't actually have the vocabulary to describe what I feel was going on. I don't think those words I have just given do justice to how I feel.

I have discussed - - when I first became involved with this, and it dawned on me just what had gone on, I sort of discussed some of the aspects with colleagues in the United Kingdom who obviously said what's happening over there and what do you mean about this or what you are on with and - - I mean, any single piece - - I just could pick out any anecdote or any little story from the mine. I just have a fund of them that, you know, people - - just like a ceaseless, amazing everybody story, you know.

¹²⁰Westray Commission of Inquiry, p. 3298. His views are made more clear at p. 3333 where he indicates that the existence of a layer is probable but it would not necessarily be there at all times. It would depend if it was a good or a bad ventilation day.

¹²¹ Ventilation Aspects of the Westray Explosion, Third Report, 11-8-94, p. 19.

I mean things like - - I mean, in England, the idea of taking oxyacetylene burners down a mine and using them in the return or using them in the mine at all, but using them in the return is just unheard of. And when you come out with stories like they actually lit gas on the floor and threw stone dust on it and then it went out and then when it - - they wondered why and they found out the service fan had been turned off at the time. And then when they got the service fan back on and they got the flames out, they carried on burning. You know, I mean, it is just incredible, fantasy type of thing that I never deemed likely to have happened.

But to have sealed off an area of disused workings known to be gassy with a plywood wall is incomprehensible to me.

(emphasis added)

Westray Commission of Inquiry, p. 3481-2

The issue of the quality of the seals at the SW 1 panel was of considerable importance. Other experts were of the view that there was a sufficient quantity of methane for there to be a methane explosion as early as the roadway in SW 2-B. Mr. Liney was of the view that the methane leaking through the seals at SW 1 provided the necessary quantity of fuel to generate a large enough methane explosion to then trigger a shock wave, raising coal dust in a suspension which would then be ignited by the following flame front.

It was Mr. Liney's opinion that had explosion proof seals been constructed at SW 1, then, even though methane would still have leaked, it might not have resulted in a layer. More significantly, it was his opinion that an explosion proof seal at SW 1 would have prevented any ignition of methane in that area and would have resulted in a 100% survival rate for the men in the north mains.¹²²

However, in a letter dated June 18, 1998, he wrote that in leaving SW 1 on the return and with flimsy seals, although perhaps outside the spirit of the *Coal Mines Regulation Act*, it was questionable whether it was a contravention due to the vagueness about the definition of "pure air"

¹²² Westray Commission of Inquiry, p. 3474-5.

and that the Regulations do not really define the quality of seal.¹²³ He wrote that the quality of seals at SW 1 was certainly at the very bottom of what might be considered acceptable in North America. He concluded:

I believe that the sealing method used at SW1, the placing of working districts on its return, and the failure to anticipate or monitor for layering from SW1, or even in general, are all very poor standards of managements but were probably short of negligence given what I now take to be Phillips' knowledge and beliefs at the time.

June 18, 1998, p. 8

It is, therefore, again our conclusion that although Mr. Liney may well have made some comments indicative of, or flagging areas of concern or weakness in the factual underpinnings of his views, it would be unreasonable to conclude anything other than he had indeed changed his views. These opinions, especially as they relate to ventilation matters, would easily create a reasonable doubt on those allegations.

We have been unable to identify the existence of any additional information provided to Mr. Liney during the period of January - June 1998, that would, in our opinion, provide a sound foundation for the change in the tenor and substance of his opinions.

Pre and Post-Explosion Sampling of Coal Dust

It appears that all dusts that are carbon based are explosive if the dust is of a certain quantity in suspension and exposed to an igniting agent. The dangers of coal dust are well known. There are a number of measures that have been developed to combat the danger. The first is to clean up the dust. Another is the use of water sprays to prevent the dust from being raised into the atmosphere.

¹²³ *Coal Mines Regulation Act* refers to the seal as being "substantial."

Still another is the use of incombustible material (stone or rock dust) to dilute the coal dust to a ratio to ensure that it will not combust.

The *Coal Mines Regulation Act* legislated that mines, unless they are naturally wet, shall be "systematically cleared" to prevent the accumulation of coal dust and "systematic steps" be taken to prevent explosions of coal dust from occurring. Many of the provisions in this *Act* are not well drafted and they create an awkward interdependence between mine managers and the inspectorate from the Department of Labour. They do, however, require that roadways be treated with stone dust to a mixture whereby the incombustible content is 65%. Where methane is present, for each percentage of methane the incombustible content is to be increased by 10%. Requirements to test the samples from the roadways are set out.

No sampling program was put in place at the Westray Mine. It appears that there were a number of requests for such a sampling by the Department of Labour inspectorate. Finally, an Order was issued on April 29, 1992, by the Department of Labour. It included a direction that the roof, floor, and sides of roadways be cleared of accumulations of dust and that systematic steps be taken to apply stone dust to prevent explosions of coal dust and that management develop a plan for applying stone dust to prevent coal dust explosions, as well as a sampling plan to test combustibility levels of the dust.

On April 29, 1992, an employee of the mine collected a number of samples from two locations. The samples were collected using the procedures set out in the *Coal Mines Regulation Act*. They were taken from the floor and ribs on the #2 main slope (the return) between #9 and #8 cross-cut over a 50 yard zone. Samples were also taken from SW 2-A road consolidating into four samples to be tested. These samples were not tested for total incombustibility content, but only for ash content, ash making up the highest percentage of potential incombustibility levels in the dust (the other major contributor to incombustibility being moisture). The samples appear to be well in excess of the minimum statutory levels.

The same employee took samples on May 8, 1992, at two different locations, again pursuant to the requirements of the *Coal Mines Regulation Act*. These samples were tested after the explosion. The test results demonstrated combustibility levels far in excess of the statutory minimum.

Following the explosion, samples were taken by the Department of Labour on May 24, 1992, and by the RCMP on July 16, August 12, August 13, September 24, 25, 27, and 28, 1992.

By and large, the samples showed that combustible matter was greater than 35%, with little evidence of significant amounts of rock or stone dust.¹²⁴

Mr. Liney gave his opinion in March 1998 that the pre and post-explosion sampling were of little value. Then, in May 1998, he provided the opinion that they were of no value. If, in fact, Mr. Liney was correct, it would go a long way to reassure the public that the decision by the Crown to discontinue the prosecution was not only one that was reasonably reached, but was correct from a substantive point of view.

The evidence that the Crown had available to it can be listed as follows:

- Eyewitness testimony from miners and others underground about the quantity and characteristics of the coal dust (i.e. dark in appearance and fine).¹²⁵
- The documents and descriptions by the miners demonstrating the limited number of times that stone dust was applied.

¹²⁴ Dr. Paul Amyotte, P. Eng., Report to the RCMP, January, 1994, p. 9.

¹²⁵ It is well recognized that mine dust that has been adequately rock or stone dusted will be grey or even lighter in appearance. The finer the dust, the more dangerous it is.

- According to industry standards, the mine had not purchased enough stone dust.
- The statement allegedly made by Mr. Phillips on or about April 29 that "the dust had gotten out of hand in the last 10 days or so."
- The fact that adequately stone dusted roadways will not explode, and if an explosion encounters a roadway that is adequately stone dusted, that roadway will inhibit the explosion from continuing.
- It was the opinion of the Crown experts, including Mr. Liney, up to March 1998, that a coal dust explosion did occur.
- That the pre and post-explosion samples demonstrated a lack of stone dusting and combustibility levels significantly in excess of the 35% statutory limit. None of them met the higher standard imposed by the Department of Labour in permitting non-flame proof vehicles in certain areas of the mine of 15% combustibility.
- Tests on coal taken from the Westray Mine demonstrated that dust produced from the coal was indeed combustible and required the admixture of stone dust.

It is well known that post-explosion samples cannot provide a precise determination of pre-explosion conditions. It appears logical that there will be some redistribution of dust due to the explosion forces. It is also known that frequent sampling will assist in the confidence of the post-explosion sampling results. In addition, the burning of combustible matter during the explosion can result in combustibility levels being less following an explosion than actually existed prior to it.

The Crown had available as experts on these issues J. Kenneth Richmond of the United States, and Dr. Paul Amyotte from the Technical University of Nova Scotia. Mr. Richmond appeared to be eminently qualified. Dr. Amyotte, while lacking some practical experience, also appeared to be eminently qualified. He provided clear, logical reports. It was his opinion that the post-explosion sampling gave a fair and reasonable indication of pre-explosion conditions and set out detailed reasons for that opinion.

Despite the seeming strength of the evidence on this issue, the second Westray prosecution team continued to harbour doubts about whether or not the post-explosion samples would, in fact, be considered to be representative of the mine dust in the mine, not just in relation to pre-explosion conditions, but even in relation to post-explosion conditions. There are references at various times in the meeting notes of the Westray prosecution team of the advisability of obtaining an expert to deal with the issue of the import of the post-explosion dust sampling results. In fact, in May 1997, the RCMP contacted officials at CANMET¹²⁵ in Ottawa to inquire about the identity of such an expert. They were provided with a reference for Jan Merks of Matrix Consulting Inc. in British Columbia. It appears from the investigative records of the RCMP that attempts were made to contact Mr. Merks by telephone. These attempts were unsuccessful. No further attempts were made despite repeated references after that date by members of the Westray prosecution team of the need to obtain an opinion on the validity of the post-explosion sampling.

Mr. Merks is a specialist in metrology, the science of measurement. An examination of his resumé reveals him as an expert on the issues of sampling, sample preparation, and analytical methods. We sent to him all available information with respect to the location, procedure, and handling of the samples and the results of testing done on them. He responded to us that based on his statistical analysis, the probability that the dust in the mine did not meet the *minimum* incombustibility level of 65% is so high that it approaches certainty. He concluded: "... The test results allowed rigorous

¹²⁵ CANMET is the Canada Centre for Mineral and Energy Technology - a division of Natural Resources Canada (formerly Energy, Mines and Resources).

statistical inferences which confirm that the percentage combustible matter in the underground workings of the Westray Mine did exceed the maximum allowable limit of 35%."

We must stress that it should not be concluded from this that it is our opinion that the Crown should have proceeded to trial. We have not examined all of the statements of witnesses and the documentary evidence. We certainly have not conducted any interviews of the hundreds of witnesses that the Crown would have needed to rely on at a trial.

In addition, our comments and opinions should never be taken as indicative that one, both, or all three accused are guilty of the offences with which they were charged. To even tentatively hold that view would be an affront to not only the presumption of innocence, but also give no credence to the fundamental roles that would be played in a trial process of such things as cross-examination by skilled and well prepared attorneys, rulings on the admissibility of evidence, and the opportunity of the defence to adduce evidence of both expert and non-expert witnesses.¹²⁶ What this inquiry does demonstrate is that there were well-respected people in the industry who could have shed light on the key issue of the validity of the post-explosion sampling.

We have also identified the fact that there are experts in the field of methane explosions, and it seems clear that the Crown could have engaged such experts to assist them in their ultimate decision of whether or not to proceed.

The answer to the obvious question as to why they did not seek the assistance of such additional experts is not easy. In our opinion, there is no one reason. This issue is explored at page 161.

¹²⁶ It must certainly be recognized that the Crown knew of a number of witnesses who were underground at the Westray Mine, who were knowledgeable in mining, yet did not appear to notice what were described by others as being a very black and dusty mine. Many world class experts had been retained by Curragh Inc. It is unknown what their opinions were and whether or not any of them had been retained by the defence.

SECTION VI: WHY DID IT TAKE SO LONG FOR THE CROWN TO REALIZE THAT IT DID NOT HAVE A REASONABLE CHANCE OF CONVICTION

When the charges were first laid by the RCMP on April 20, 1993, the Crown had not made an assessment as to whether there was or was not a reasonable chance of conviction. They had not done so because they did not have a realistic opportunity to examine the investigative file. When the indictment was preferred in May 1994, it appears that the Crown felt sure that they had not just a reasonable chance of conviction, but a very good one. Indeed, lead counsel, Mr. Felderhof, at that point was of the opinion that there was an 80% likelihood of conviction.

The issue of likelihood of conviction at trial was revisited in June 1995 during the deliberation about whether or not to appeal the judicial stay of proceedings entered by Justice Anderson. Although their confidence was clearly shaken by the developments during the trial, particularly the inability to deal with the documentary aspect of the case, members of the first prosecution team still believed there was a reasonable chance of conviction.

The issue was not revisited again until March 1997, when the DPP, Jerry Pitzul, asked for a report from the team on the issue. Up to March 24, 1998, the team was of the view that it did have a reasonable chance of conviction. It was the opinions of Mr. Liney, commencing March 24, 1998, and concluding June 18, 1998, that caused the team to alter this view. From our discussions with the members of the Westray prosecution team, if it had not been for Mr. Liney's opinion, they would have been able to proceed to trial. *There was, therefore, no undue delay.*

We have reviewed many drafts of briefing materials done by the members of the second Westray prosecution team leading up to the formal public announcement of the stay of proceedings. In those materials, opinions are expressed by some of the team members about the issue as to why it took so long to arrive at this decision. These materials suggest that although the reason for the decision was primarily the supplementary opinions from experts, delay was also caused by the

lengthy period required to examine and re-examine thousands of additional documents.

The role the documents played in the Crown's handling of this case was indeed significant. In order to satisfy what they understood to be their disclosure obligation, they set out a comprehensive and organized plan to locate, copy, catalogue, and produce hundreds of thousands of additional documents from the Westray Public Inquiry, the Department of Labour, Department of Natural Resources, Department of Economic Renewal, the Premier's office, and from the RCMP administrative files. Vast amounts of resources and time were spent on this task. Report #2 (Disclosure) dated September 8, 1997, details their efforts.

No one has identified any materials to us that were located through this extensive cataloguing process that turned out to be significant. However, there is no question that, in the circumstances, the task was one that was required to be carried out.

We identified earlier the question as to why the Crown did not seek the input from other experts to resolve some of the troubling issues. We reiterate there is no one reason. In our opinion, it was caused by a variety of factors. Without any emphasis on which was more important than any others, that list is:

- The monumental undertaking by the Westray prosecution team to locate, review, catalogue, and reproduce documentary materials.
- By design, there was no lead counsel. There was, therefore, considerable duplication of work, as well as a lack of focus as individuals identified problems and issues and pursued those at the expense of completing the assigned task.

- The team had come to rely heavily on the opinions of Andy Liney. They considered him to be knowledgeable and reliable.
- The inherent complexities associated with three concurrent investigations involving an alleged crime scene where continuity of the scene was not protected and where there was not the normal extensive forensic examination of a mine explosion.
- The case presented more than the usual demands with respect to the legal issues that faced the Crown.

Resourcing

We have set out later in this report the impact that resourcing had on the prosecution effort in the period 1992 until the end of trial in 1995.

Although some would argue that additional resources would have assisted the Crown, in our opinion, the necessary resources for the Public Prosecution Service to bring this prosecution back to trial were made available. While we do have some reservations about the efficiency of the utilization and resources that were available, the issue of resourcing was not an impediment to either the Public Prosecution Service retrying these charges or in arriving at an earlier conclusion that, in their opinion, in the opinion of the remaining members of the Public Prosecution team, that there was not a reasonable chance of conviction at trial.

SECTION VII: REVIEW OF THE PROSECUTION EFFORT - 1992-1995

May - August 1992 - Commencement of the Investigations

During the period of its operation the Westray mine was under the regulatory control of the Province of Nova Scotia. Many government departments interacted with the Westray Mine owner, Curragh Resources, for a broad variety of reasons.

Coal mining is an inherently dangerous undertaking. General worker safety is regulated in Nova Scotia by the *Occupational Health and Safety Act* (OHSA), R.S.N.S. 1989, c. 320. Coal mine safety had a specific regulatory regime set out in the *Coal Mines Regulation Act* (CMRA), R.S.N.S. 1989, c. 73. Ensuring compliance of the Westray mine with these safety laws fell to the Department of Labour (DOL).

As pointed out in the introduction, it was May 9, 1992, that a massive explosion traveled through the entire Westray Mine, killing all twenty-six persons working underground. In the days immediately following the explosion a rescue attempt was carried out under the direction of Curragh Inc., Gerald Phillips acting as the company's rescue coordinator. He would later be charged with offences arising from allegations of unsafe, indeed criminal, conduct in the running of the mine. The rescue attempt was officially abandoned on May 14, 1992.

On May 15, 1992, the provincial government appointed Justice K. Peter Richard of the Nova Scotia Supreme Court to conduct an Inquiry into the establishment and operation of the Westray Mine. The appointment included a mandate to determine whether there had been violations of mine safety laws and regulations in the operation of the mine. The Inquiry had the power to summon witnesses and to demand production of relevant documentary materials.

Claude White, Director of Mine Safety with the Department of Labour, contacted Donald Mitchell on May 16, 1992, to retain him to assist in a pending investigation by his department. That investigation commenced May 23.

The final investigative agency to join the hunt to isolate the causes and potential culpability for the explosion was the Royal Canadian Mounted Police (RCMP). While there had been unconfirmed reports of possible criminality in the operation of the mine, the initial view taken by the RCMP was that the *Coal Mines Regulation Act* conferred investigative authority on the Department of Labour. The RCMP had confined their role to support at the mine site. e.g., traffic and crowd control. By May 20, the RCMP decided that, notwithstanding the absence of a formal complaint to them, they should undertake a criminal investigation. On May 21, 1992 Staff Sergeant Ches MacDonald was appointed to head the effort. He was an experienced officer based in the Truro Subdivision office. He was to be assisted by a team of 13 members. Sgt. R.A. Peebles was the lead investigator and the Case File Manager was Cpl. J.C. Cowan. One of the first things done was to establish RCMP control of the twenty-four hour security at the mine portal.

Our interviews have made it clear that this 12-day delay prior to RCMP involvement was significant to the investigation, in the sense that it left open to speculation the possibility that important evidence may have been lost both in the mine and from the offices of the mine operators in the days following the explosion. Allegations were made that documents were shredded inappropriately, and that machinery was altered to bring it into compliance with legal requirements. Mine Examiner Reports¹²⁸ for April 1992 were never located. Whether or not anything truly significant was lost is impossible to ascertain.

There was throughout the criminal investigation and prosecution a lingering question of the appropriateness of the Department of Labour investigating alleged breaches of regulations that it

¹²⁸ Mine Examiners are employees of the mine who inspect the working places and other accessible parts of a mine to make sure they are safe before a shift is allowed to enter. They must have a certificate of competency as a mine examiner. They were required pursuant to section 38 (3) of the CMRA to prepare daily reports setting out their observations.

was supposed to ensure compliance with.

A further issue that arose throughout our review was the awkward, and some would say damaging, interplay of two separate investigations running concurrently to the criminal investigation. Two examples will illustrate the point:

- 1) Statements were being sought out from the same potential witness pool by several investigators;
- 2) Seizing and copying of documents by differing agencies for differing purposes without regard to criminal court admissibility/disclosure requirements.

1) The Statements;

Lawyers for the miners, DOL investigators, Commission of Inquiry staff and the RCMP all asked questions of potential witnesses, each employing their own investigative techniques and each for their own specialized areas of concern.

Some interviews conducted by non-RCMP investigators after the explosion contained significant amounts of leading questions on important issues. Interviews were sometimes conducted jointly, thus allowing the potential witnesses to relate a shared recollection instead of more credible independent recollections.

The number and manner of the witness interviews became an issue for the Crown in trying to sort out what was a reliable recollection of a witness. We have reviewed some of the statements and this was a valid concern.

We were informed that in the years after, Crown Attorneys started encountering witness fatigue with some witnesses. They, understandably, were tired of answering and reanswering questions on what had been a very traumatic event in their lives, one many wanted to put out of their minds to the extent that it was possible to do so.

2) Seizing and copying of documents;

This issue was problematic for investigators of the DOL and the RCMP and ultimately for the Public Prosecution Service lawyers who had carriage of the case. It played a direct role in the collapse of the trial in 1995, which will be reviewed in a later part of this Report.

One of the first things done by the RCMP was to meet with Marvin Pelley, President of Westray Coal (a Division of Curragh Inc.), to get an explanation of the workings of Westray. The RCMP then focused on seeking out and interviewing the miners who had made public allegations of unsafe conditions in the mine. On May 23, 1992, the initial assignments of miners to be interviewed were given out to members of the RCMP. On the same date, Cpl. Clarence Fidler commenced an investigation into the allegation of inappropriate shredding by Westray employees.

Two members of the RCMP investigative team, Cst. M. Cashin and Cst. R. Rogers,¹²⁹ had prior mining experience. They offered some expertise in identifying issues for the investigation and possible experts to consult.

There was no expectation in May 1992 that this case would become as heavily tied to documentary evidence as it eventually did. The first large group of documents was turned over to the RCMP on or about May 23, 1992, by the law firm representing Curragh Resources. This was not a search and seizure. The materials were turned over "for safekeeping" - the RCMP were to act as a conduit and to transmit the materials to the Inquiry. There were 22 boxes of materials, together with some

¹²⁹ Cst. R. Rogers was transferred at the end of June 1992. Before leaving, he prepared a very useful memorandum of steps that should be taken in the investigation.

coal dust samples that had been taken on May 8, 1992.

The RCMP participated in some preliminary entries into the mine on May 23, 24,¹³⁰ 29,¹³¹ and June 1. These were not primarily intended to be for evidence gathering, but rather to familiarize the investigators with the mine.

We are advised that the first official contact between the RCMP and the PPS was a telephone call from RCMP Supt. I.E. Furey, Officer in Charge, Criminal Operations, to John Pearson, the DPP, on May 25, 1992. There was agreement that the RCMP was correct to investigate.

On May 26, the RCMP began examining documents at the mine offices. Realizing that it would be a slow process due to the volume and subject matter, the materials were moved to a single location within the Westray offices and a guard posted.

On May 27, Sgt. Peebles and S/Sgt. MacDonald met with Robert Parker Q.C., and Herman Felderhof, who were the senior Crown Attorneys in the New Glasgow office of the PPS (the one which included responsibility for the geographical area where the explosion had taken place). One of the topics discussed was S/Sgt. MacDonald's need for precharge legal advice.

In the period May 26-28, 1992, the RCMP continued to conduct interviews and exchanged information with Harry Murphy, a private investigator retained by DOL to assist in its investigation. DOL, obviously, had at that point people with more relevant knowledge and experience than the RCMP, so this type of information exchange was beneficial to the RCMP.

On June 2, 1992, Westray management proposed to stabilize the mine by flooding the North Mains.

¹³⁰ During the May 24th entry, Cpl. Harry Ullock was present when DOL investigators seized 50 dust samples.

¹³¹ Cpl. Barry Paquet took some photos of the mine down to the #1 cross cut.

On June 5, 1992, Robert Parker, acting upon the request from S/Sgt. MacDonald, sent a letter to John Pearson requesting that Herman Felderhof be assigned to give precharge advice to the RCMP investigators. At that time, Mr. Felderhof had 14 years of practice, the last 11 years of which had been as a Prosecutor. He had an undergraduate degree in soft rock geology and was familiar to S/Sgt. MacDonald. He had not, until that time, been exposed to a file of this size or complexity.¹³² For that matter, in looking at the staff of the Public Prosecution Service in 1992, only John Pearson could be said to have any similar experience (acquired while acting as a Crown Attorney in Ontario prior to coming to Nova Scotia).

It was decided that Mr. Felderhof should take some time and make an assessment of the demands that would be put on the Crown in giving precharge advice.

The files that the RCMP had received from the solicitors for Curragh were given over to the Commission of Inquiry on June 6, 1992.

On June 8, 1992, a Sgt. A. O'Donnell set up a computer programme for cataloguing and word searching the witness statements. Also on June 8, Cst. Rogers was given the task of locating an expert to advise the RCMP.

On June 12, 1992, Cpl. Ullock executed a Search Warrant on the mine and seized cable, wire, rock dust and coal dust.

The Commission of Inquiry took possession of the mine office files on June 15, 1992, after which the RCMP removed the guard that they had posted at the Westray offices.

All of the interested parties employed experts to provide advice on various aspects of the mine

¹³² This was not Mr. Felderhof's first involvement in the file. Within a few days of the explosion he had received a request from DOL counsel to assist in drafting Orders to produce documents and records and to secure the mine site pursuant to the *Occupational Health & Safety Act*. He did this and served the Orders on the solicitor for Curragh.

operation and the possible causes of the explosion. The RCMP, quite rightly, felt that they should have their own consultant, and on June 17, 1992, retained J. Kenneth Richmond, a well recognized Seattle-based expert in the study of mine explosions. As noted, DOL had Mr. Mitchell to advise its investigators. The insurers for Westray employed Professor Ian Muirhead from the University of Alberta. The Commission of Inquiry retained a number of experts to assist in its investigation, which would eventually include Dr. Malcolm MacPherson from Virginia.

Steve Farrell, a former mine manager with DEVCO and a Sydney-based consultant became an important advisor to the RCMP and the first prosecution trial team. While there were many other experts employed, these individuals were the principal persons looked to for an opinion on the cause(s) of the explosion. Each of these - to be joined by Andy Liney in 1994 - were important to the understanding that the Crown Attorneys in charge of the criminal case had as to the ability to prove the culpability of the accused.

Two officers, Cpl. Ullock and Cst. Cashin, started a 40 hour draegerman's course on June 22, 1992, in anticipation of going underground to take photographs and to conduct search and seizure operations for relevant evidence.

The flooding of the North Mains took place commencing around June 23. It was completed to just below the # 10 Cross Cut by June 30. Regrettably, this resulted in the area, while not believed to be the point of ignition of the explosion, to be forever lost for the purposes of forensic investigation.

It does not appear that investigators or experts seriously questioned the decision to flood, a decision approved by DOL after consultation with the Inquiry. It did, however, take place without the RCMP having the opportunity to have Mr. Richmond advise them on an issue which could have been important to their investigation. The flooding turned out to be one of the obstacles in

obtaining a more complete evidentiary foundation for the expert opinions¹³³ that the Crown ultimately needed to rely on in the criminal prosecution.¹³⁴

The Southwest area of the mine, where all agree the explosion initiated, was still available to be investigated and in time this occurred. It should be noted that the DOL approved the request for the Southwest area to be flooded in early July 1992. The approval was later conditioned that further flooding could only take place when DOL said so. When Mr. Richmond was consulted on this issue he said that the "...only reason to flood a mine is to extinguish a fire or to destroy evidence."

By the middle of June 1992, Cpl. Fidler finished his investigation of the suggestion of improper document shredding and concluded that there was no evidentiary basis for the allegation.

By the end of June 1992, the RCMP investigators had spoken to 130 or more witnesses. They had the preliminary views of their own expert and the information obtained from other investigators. From the information available to them, their investigation focused on concerns about excessive coal dust, lack of adequate stone or rock dusting, lack of training, illegal equipment underground, high levels of methane, improper ventilation, and the apparent emphasis on production before safety. Given that the statutory regime vested responsibility for these safety matters with the mine managers, they became the focus of the criminal investigation.

During the month of June, the RCMP made plans to interview DOL and Department of Natural Resources (DNR) personnel and to execute search warrants on those departments. In addition,

¹³³ For example, Mr. Liney hypothesized in 1998 that the destruction and deaths in the north mains could have been caused by a methane only explosion. A thorough forensic examination of that area of the mine in 1992 would have assisted in either supporting or disapproving that notion. The eyewitness accounts of the rescue teams who were in the north mains after the explosion were seen by Mr. Liney as not being conclusive, though in our assessment, should have been given more weight.

¹³⁴ Even if the north mains had not been flooded, the conditions in the mine made it uncertain that investigators could have ever reentered the north main without a substantial undertaking to be able to safely access that area of the mine.

searches were to be carried out at the Commission of Inquiry¹³⁴ and at the mine site.

These plans were changed on or about June 23, 1992, due to the Order issued by the Westray Commission of Inquiry dated May 25, 1992, which directed that Curragh, DOL, and all government departments, federal and provincial, "forthwith deliver all documents, records and files having any relevance to the business of the Inquiry" to it. Ironically, the RCMP assumed that *all* relevant documents were being gathered by the DOL and other government departments and sent to the Inquiry and that they would be available to the RCMP through the execution of Search Warrants on the Inquiry, if and when they needed them. This view did not recognize that relevancy for criminal investigative purposes could be quite different than for the DOL or an Inquiry, with the result that documents might not get seized that the prosecution would later need. Neither did the decision recognize the potential for a loss of continuity of evidence. The RCMP did not foresee that they would be dependent on the quality of the search for and cataloguing of documents done by other agencies. This was not a good investigative decision.

Mr. Felderhof decided that, in advising the RCMP investigators, there was too much work to be done in combination with his regular caseload and that a full time Crown needed to be assigned to advise the investigators. Mr. Felderhof set out this advice in a letter to Mr. Pearson dated June 23, 1992.

On June 24, 1992, Supt. Furey wrote to John Pearson inquiring about the authority of the RCMP

¹³⁴ It may seem odd to many at first blush that the Commission of Inquiry would not simply voluntarily turn over to the RCMP, information and documents. However, it should be pointed out that there have been many attacks on the constitutional validity of provincial inquiries on the basis that by design or through their effect, they serve as a substitute police investigation and preliminary inquiry. A public inquiry has broad coercive powers to compel production of documents and testimony and thereby gather evidence in a manner that the RCMP or other police agency cannot do. See for example *Starr v. Houlden*, [1991] S.C.R. 1366; 55 C.C.C. (3d) 472; *O'Hara v. British Columbia* (1987), 38 C.C.C. (3d) 233 (S.C.C.); *Castle v. Brownridge* (1990), 59 C.C.C. (3d) 77 (Sask. Q.B.). Indeed, applications were brought by Phillips, Parry and others attacking the constitutional validity of the Westray Commission of Inquiry. The attacks were ultimately unsuccessful: see *Phillips v. Re: Nova Scotia (Commission of Inquiry in the Westray Mine Tragedy)* (1992) 116 N.S.R. (2d) 34 (N.S.S.C. T.D.); 117 N.S.R. (2d) 218 (N.S.S.C.A.D.); Reversed on appeal [1995], 2 S.C.R. 97; (1995) 98 C.C.C. (3d) 20 (S.C.C.).

to investigate offences contrary to the CMRA and the OHSA. He recorded that S/Sgt. MacDonald was of the view that the RCMP did not have the jurisdiction to investigate those offences. He also raised the issue of Mr. Felderhof's continued role in giving precharge advice. It is our understanding that Supt. Furey did not feel that the services of a Crown were required on a full time basis.

On July 9, 1992, Mr. Pearson, in reply to Supt. Furey's inquiry of June 24, advised the RCMP that it had authority to investigate offences contrary to the CMRA and OHSA. Nevertheless, the DOL continued its own investigation and the RCMP continued to focus only on the *Criminal Code* investigation. In relation to the concerns about Mr. Felderhof's ability to devote the time required to give appropriate precharge advice, Mr. Pearson indicated a willingness to seek emergency funding to ensure that the PPS could fulfill all its responsibilities, but before taking such an extraordinary step, he would have to be satisfied that the demands could not be met using the existing resources.

Kenneth Richmond arrived in Nova Scotia to advise the RCMP on June 28 and traveled to the mine site on the following day. He met with employees of the mine and gained information about the conditions underground and the likely causes of the explosion. He gave instructions to officers Ullock and Cashin on the proper methods of obtaining coal dust samples. On the 30th, Mr. Richmond reviewed the miners' statements to police. He agreed to return to visit the mine once bare-faced¹³⁶ entry was permitted.

Mr. Richmond completed his first report for the RCMP, who received it on July 16. It was a strongly worded indictment of the conduct of Mr. Phillips and Mr. Parry in the operation of the mine.

On July 16, Cpl. Ullock and Cst. Cashin, together with three others, entered the mine to the #10

¹³⁶ That is without oxygen masks.

cross cut. Cst. Cashin took 10 dust samples through a 200-yard zone constituting a single exhibit. He took a second exhibit of dust samples as well. Photographs in the area between #8 and #9 cross cuts were also taken.

In July 1992, two meetings were held involving the PPS management and the RCMP investigators and their superiors. At the second of these meetings, held on July 29, two divergent views were expressed. S/Sgt. MacDonald and Herman Felderhof strongly believed that a full time Crown was required to advise investigators on legal issues that were continually presenting themselves and, in S/Sgt. MacDonald's view, slowing down his investigation.

RCMP supervisors and PPS management felt that there was a more limited role for the PPS to provide precharge advice on "appropriate legal issues." The latter view was adopted as the result of these meetings. It was decided that when the investigators required assistance they would first look to Mr. Felderhof or Mr. Parker, and if they were unable to assist, the investigators would contact PPS head office for advice. S/Sgt. MacDonald thought this to be unsatisfactory, and at one point considered the possibility of retaining legal counsel to provide advice.¹³⁷

The concerns which lead to this disagreement had their basis in the results of the Commission of Inquiry into the wrongful conviction of Donald Marshall Jr., which reported in 1989.¹³⁸ That Inquiry sought to isolate the reasons for the miscarriage of justice that Mr. Marshall suffered. The report made far-reaching recommendations, including a framework for the establishment of the Public Prosecution Service and the separation of the roles of the investigators and the prosecutors.

The basic theoretical structure is that the task of the police is to investigate. If the police conclude that there are reasonable and probable grounds to believe that an offence has been committed, they will lay the appropriate charge. The Crown Sheet, or brief to the Crown from the police, is then

¹³⁷ S/Sgt. MacDonald acknowledged to us that he did not consider the investigation to have suffered from lack of legal advice.

¹³⁸ Royal Commission on Donald Marshall, Jr., Prosecution (1989).

presented for PPS review and action. The lawyers for the PPS will then consider the materials presented and apply its policy on proceeding with or terminating the prosecution.

There is a statutory role, however, for the PPS to be involved prior to the laying of charges. Section 4(d) of the *Public Prosecutions Act* S.N.S. 1990, c.21, provides that the Director of Public Prosecutions:

"(d) shall advise police officers in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution when the police request such assistance"

(emphasis added)¹³⁸

Given the fact that the July 1992 discussions were so soon after the government's adoption of the Marshall Inquiry recommendations,¹³⁹ it is not surprising that managers were conservative in their approach to the question. The PPS did not want its lawyers becoming too close to the investigation and thereby losing the needed objectivity to assess and determine the fate of any charges brought to it for prosecution. The RCMP did not want their members taking direction from a Crown Attorney on investigative matters.¹⁴⁰

Mr. Pearson learned in the meeting on July 29, 1992, that the RCMP were concerned about the impact that the laying of provincial regulatory offences would have on the criminal investigation. In

¹³⁸ The extent to which the Crown should be involved in the pretrial stage was and still is the subject of disagreement. At the time of the writing of this Report the issue is before the courts in the case of *R. v. Gerald Regan*. Justice Michael MacDonald of the Nova Scotia Supreme Court, in pretrial motions, decided on the facts of that case that the role of the Crown in the precharge stage should be far more limited than the PPS advocates at this time. The Nova Scotia Court of Appeal overturned Justice MacDonald's decision and the case is now on appeal to the Supreme Court of Canada. Because the issue is before the courts we will make no recommendations on what the appropriate precharge role of the PPS is or should be.

¹³⁹ The government accepted, or accepted the intent of all 82 recommendations of the Marshall Inquiry: see Government of Nova Scotia Response to the Recommendations of the Royal Commission on the Donald Marshall Jr. Prosecution, February 7, 1990.

¹⁴⁰ S/Sgt. MacDonald was emphatic in saying to us that he disagreed with the suggestion that his investigation would be improperly influenced by having a full time crown attorney available to him for precharge advice.

a fax to Supt. Furey dated the following day, July 30, Mr. Pearson indicated that he would need further information before being in a position to offer an opinion on the possible consequences of such an event. He urged that the investigating agencies adopt a coordinated approach to the investigation and laying of charges.

Mr. Pearson followed this action up by sending a Memorandum dated July 31, 1992, to Doug Keefe, Executive Director, Legal Services, Department of Justice (NS). In it he set out the concerns about the lack of coordination between the DOL and the RCMP and, in particular, the RCMP's question about the potential for problems of double jeopardy.¹⁴² and issue estoppel.¹⁴³

On August 16, 1992, the DOL requested that the PPS provide it with precharge legal advice in its investigation of the regulatory breaches. Eight days later, DOL investigators presented John Pearson with a two-volume investigative brief. This would eventually lead to the drafting and filing of an Information on October 5, 1992, containing 52 charges alleging breaches of the CMRA and the OHSA by Curragh Inc., Gerald Phillips, Roger Parry, Glyn Jones, and Robert Parry. Until August, DOL investigators had relied on advice from lawyers with the Department of Justice (NS).

September 1992 - April 1993

John Pearson provided advice to the RCMP and DOL in August and September 1992, on issues of double jeopardy and on obtaining material from the Commission of Inquiry by Search Warrant. He also started the process to free up two Crown Attorneys to work on "Westray." This process was set in motion with a request to Management Board on August 24, 1992.

Chris Morris was appointed to act as a full-time, and Stephanie Cleary as a part-time, "Westray" Crown Attorney commencing in early September 1992.

¹⁴² That is, whether a conviction for a provincial regulatory offence would act as a bar to the prosecution of more serious *Criminal Code* offences.

¹⁴³ That is, if an issue is decided adversely to the Crown in one proceeding, the Crown is estopped from relitigating it in a subsequent proceeding.

Mr. Morris had been admitted to the Nova Scotia bar in 1984 and was assigned to the Dartmouth office of the PPS when he was asked to become involved in the case. Stephanie Cleary was also based in Dartmouth, having been hired in 1991 following graduation from Law School. It was thought that Mr. Morris would provide advice to the investigative agencies while Ms. Cleary would assist with legal research.

From the beginning their tenure was troubled. Initially, it was Mr. Pearson's view that they were to advise both the RCMP and the DOL, a position that Mr. Morris quickly concluded was untenable. It was his opinion that some DOL employees were possible suspects in an investigation by the RCMP arising from the manner in which some of the inspectors and their supervisors had carried out, or not carried out, their duties to enforce regulatory compliance by Westray management.

Mr. Pearson's position was that one of the purposes of establishing an independent Public Prosecution Service was to give it sufficient distance from government to be able to prosecute cases even where there was alleged governmental culpability. Mr. Morris' view was that it was a conflict of interest to be providing advice to both the DOL and the RCMP where the RCMP's work involved the possibility that DOL employees could themselves be charged.

Despite this concern, the PPS did continue to advise the DOL on the pending regulatory charges. In September 1992, DOL solicitor Pat Clahane, drafted the fifty-two OHSA and CMRA charges which were filed with the Provincial Court on October 5. Mr. Morris, at Ms. Clahane's request, reviewed the draft Information with Robert Fetterly (later to be a member of the last trial team).

There were two potential conflicts of interest. The first was that a regulatory agency whose job it is to ensure compliance, was investigating alleged failures by an employer or others to comply with the very laws that the agency is supposed to ensure compliance with.

The second was the perception that could be created by the PPS providing legal advice to the same personnel in the DOL that *may* come to be viewed by the RCMP as suspects in its criminal investigation. This raised the spectre that the RCMP could seek legal advice from the PPS on issues surrounding a charging decision on the same personnel in the DOL.

The die that created the two conflict of interest scenarios had been cast in May when the DOL determined that it was going to conduct an investigation into the provincial statute offences and the RCMP decided to limit its investigation into alleged offences contrary to the *Criminal Code*.

In September 1992, the options available to Mr. Pearson to address this situation were:

1) To refuse the DOL request for assistance and have it retain its own counsel for any prosecution.

This was considered unacceptable because it would represent an abdication of the statutorily imposed role of the Public Prosecution Service to prosecute all offences in Nova Scotia that fell under provincial jurisdiction.

2) Have the PPS retain counsel from outside the PPS to advise the DOL and, if necessary, conduct the prosecution.

The authority for such action is found in s. 14 of the *Public Prosecutions Act*:

Appointment of barrister

14(1) The Director of Public Prosecutions may appoint a barrister to take charge of and conduct a particular prosecution or to take charge of and conduct criminal business to the extent specified in the terms of the appointment.

Powers and authority of barrister

(2) A barrister appointed pursuant to this Section shall be known and designated as a crown attorney and when acting within the terms of the

appointment, has all the powers and authority of a crown attorney.

Term of Appointment

(3) The Director of Public Prosecutions, may, from time to time, vary the terms of appointment of a crown attorney pursuant to this Section or may, at any time, revoke the appointment.

The second option would have been relatively novel in 1992. There would have been two places to look for such representation: the first would be from the private bar; the second would have been from the prosecution services in other provinces.

To have retained private counsel for this purpose, particularly so soon after the creation of the PPS, would have possibly created the impression that the PPS could not fulfill its statutory mandate. It would also be a drain on an already limited budget for the PPS. Finally, it was simply not something that the PPS had done before.¹⁴⁴ It was not a suggestion that was seriously entertained, although it was one of the suggestions put forward by Mr. Morris to the DPP.

The retention of counsel from other prosecution services was again something that was not actively considered in 1992. There are obvious difficulties in doing this. Even the OHSA prosecution was a very sizable undertaking. It would require finding a person who was prepared to spend significant time away from their home. Their own prosecution service would need to backfill the position and the cost of that passed on to the Nova Scotia PPS. We are told that this option today has been made more feasible by increased communication and cooperation among the heads of the provincial prosecution services.¹⁴⁵ This is a favourable development.

3) To try to have the investigation taken out of the hands of the DOL and put into the hands of the RCMP.

¹⁴⁴ There was precedent, prior to the creation of the PPS in late 1990, for engaging private counsel to conduct prosecutions where there was a perceived conflict of interest.

¹⁴⁵ We note that there have been some recent instances of out-of-province prosecutors acting on cases for the PPS.

As early as July 9, 1992, Mr. Pearson had advised the RCMP that it had authority to investigate offences contrary to the CMRA and OHSA. Nevertheless, the DOL continued its own investigation and the RCMP continued to focus only on the *Criminal Code* investigation.

Mr. Pearson had no jurisdiction to direct who should conduct investigations. He assumed that the investigations were being done in a coordinated effort. When he learned on July 29, 1992, that the RCMP were not coordinating their investigation with that of the DOL, he urged the investigating agencies to adopt a coordinated approach to the investigation and laying of charges.¹⁴⁶ It should also be noted that on August 11, 1992, Mr. Pearson telephoned Hugh R. MacDonald, Deputy Minister of the DOL, and requested that DOL investigators coordinate their efforts with the RCMP. While some cooperation existed among the investigators of the two agencies, the coordination of charging was not taking place. *There were sound legal reasons for Mr. Pearson's concern and suggestion.*

Chris Morris had concerns that Claude White¹⁴⁷ was involved in a management capacity with the DOL and therefore possibly involved in charging decisions under the CMRA and OHSA. He raised this concern to Martin Herschorn in a memorandum of September 21, 1992.

In a letter dated September 24, 1992, to then Deputy Attorney General, D. William MacDonald, Q.C., Mr. Pearson wrote:

Dear Mr. MacDonald:

*Re: Westray Coal Mine Disaster
 - Department of Labour Investigation*

¹⁴⁶ Letter dated July 30, 1992 J. Pearson to Supt. Furey; and Memorandum dated July 31, 1992, J. Pearson to Doug Keefe, Executive Director, Legal Services, Department of Justice (NS).

¹⁴⁷ Mr. White was the Director of Mine Safety and head of mine inspection. He was the immediate supervisor of the mine inspectors responsible for monitoring and inspection at the Westray mine.

The purpose of this letter is to bring to your attention concerns of the Public Prosecution Service relating to the process by which the Department of Labour is determining whether provincial offence charges will be laid in relation to the Westray Coal Mine disaster.

On August 24, 1992, the Department of Labour provided a preliminary investigative brief and requested pre charge advice from the Public Prosecution Service. Section 4 of the Public Prosecutions Act provides that the Director of Public Prosecutions shall advise investigators in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution when such assistance is requested. This advice is provided either directly by the Director of Public Prosecutions or through the Crown Attorneys of the Public Prosecution Service.

The Government of Nova Scotia has accepted the principle that investigative agencies have the ultimate right and duty to determine the form and content of charges to be laid in any case, subject to the Crown's right to withdraw or stay the charges after they have been laid. It is clear that prior to the laying of charges, the role of the Public Prosecution Service is advisory only. However, there are aspects of the decision making process at the Department of Labour which we feel we must comment on.

The Department of labour is investigating whether there were violations of provincial statutes at the Westray Mine in the period preceding the May 9th disaster. During this period, the Department of Labour had regulatory responsibilities with respect to the mine. We suggest that those engaged in these regulatory responsibilities should have no involvement whatsoever in the investigation of suspected violations of provincial statutes at the mine or in the decision whether charges will be laid. They are in a clear conflict of interest. A defendant charged with a provincial regulatory offence is entitled to raise defences of due diligence or officially induced error. Such defences place in issue the conduct of the Department of Labour regulators. These same regulators should not now be involved in the process for determining whether charges will be laid.

It was our understanding that Mr. Harry Murphy, a retired RCMP officer, was retained to conduct the Department of Labour investigation. He had no involvement in any events prior to May 9, 1992. Accordingly, he is in a position to reach an independent determination concerning charges. It is our

view that the integrity of the charging decision of the Department of Labour will be seriously compromised if any officials of the Department of Labour involved in the regulation and supervision of the Westray Mine are involved in the decision making process with respect to provincial offence charges. Permitting such officials to participate in the process leading to the swearing of an information may constitute an abuse of process.

We are aware of no legal impediments to the Department of Labour ensuring that its investigative and decision making role in relation to the Westray Mine disaster is performed independent of the officials responsible for regulating the Westray Mine. We believe that public confidence in the ability of the Department of Labour to fairly and properly enforce its statutes will be shaken if the Department of Labour does not take steps to ensure that the decision making process employed in this case is both fair and perceived to be fair.

Yours very truly,
(emphasis added)

We are satisfied that Mr. Pearson had taken such steps as were available to him in attempting to ensure that appropriate steps were taken by the DOL and the RCMP to resolve the investigatory conflict.

4) To retain control of both prosecutions and tell the DOL that there would be no prosecution of OHSA or CMRA charges if laid, and that the PPS would terminate, by stay or otherwise, any such charges.

To take this position in September 1992 would have been premature. While some believed that the RCMP investigation was almost certainly going to result in criminal charges it was too soon to know what charges were to be laid and against whom. In addition, it was not known when these decisions would be made. Having said that, Mr. Pearson did lay the groundwork for such a course of action to be taken at a later date. In letters of September 29, 1992, to the Deputy Minister of

Labour and of October 9 to Paul Langlois, Assistant to the Deputy Minister of Labour, Mr. Pearson advised the DOL that he would actively consider the termination of a prosecution of Provincial statute offences in favour of proceeding with more serious *Criminal Code* charges, if laid.

There was likely to be a point at which the issue of double jeopardy would have to be addressed. In addition, there was the separate, but related, problem of issue estoppel. Mr. Pearson, in a letter to S/Sgt. MacDonald of September 15, 1992, offered the opinion that from a strict legal or technical point of view there were no bars to proceedings under both provincial legislation and with offences under the *Criminal Code*. However, he also cautioned that the interests of justice may not be served by subjecting the same conduct to two separate proceedings.

These questions were also researched by Ms. Cleary. In her opinion dated October 2, 1992, she expressed the view that both sets of charges should not proceed together, and that if two sets of charges were laid, the provincial regulatory offences should be stayed in the public interest, but not for reasons of double jeopardy. Issue estoppel was thought to possibly be a concern. It was her opinion that it was not appropriate to expose the pending prosecution to the risk of it becoming a "test case." In addition, subjecting the same defendants to complex and lengthy proceedings might be considered to be an abuse of process.

Before Mr. Pearson could conclude that terminating the regulatory offences was, in fact, appropriate, he needed the opportunity to assess the results of the RCMP investigation, which would not be available for some time. He also wanted to seek the input of the DOL and the RCMP.¹⁴⁸

In fact, Mr. Pearson and the PPS did maintain control over the DOL prosecution. In our opinion, a significant factor in Mr. Pearson's decision to retain control of the DOL file was his belief that the DOL charges were unlikely to ever proceed. There was already enough information available to him

¹⁴⁸ Letter of October 9, 1992, to Paul Langlois; and letter of October 13, 1992 to Supt. Furey.

about the RCMP investigation to conclude that criminal charges were going to be laid. He was not going to jeopardize them with less serious regulatory offences unless he was convinced that they could stand together. By acting on both files he retained the ultimate decision on what charges, if any, would go forward.

The position of Mr. Morris and Ms. Cleary that a conflict existed warrants examination. It is fundamental that a lawyer cannot serve two adverse clients. Neither should a lawyer serve two clients whose positions are foreseeably adverse. The position of the Nova Scotia Barristers' Society is set out in Chapter 6 of the Legal Ethics and Professional Conduct Handbook which states:

A lawyer has a duty not to

- (a) advise or represent both sides of a dispute; or*
- (b) act or continue to act in a matter where there is or was likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.*

(emphasis added)

In its "Guiding Principles" for this rule the handbook describes a "conflicting interest" as:

...one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client. Conflicting interests include but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client whether involved in the particular transaction or not, including the obligation to communicate information.

Though it may be argued that the investigator is not a "client" of the Crown Attorney, and thus has no interest to be protected in the traditional solicitor-client context, it is apparent that there is an element of confidentiality and trust that exists between the investigator and the Crown Attorney in

the precharge advice stage. But that, in and of itself, is not sufficient to create a solicitor-client relationship upon which a conflicting interest is founded.¹⁴⁸

Faced with Mr. Morris and Ms. Cleary's concerns over conflict, Mr. Pearson elected to maintain personal responsibility for overseeing the prosecution of the DOL charges. He was not going to impose on them a task they were professionally adverse to. He had satisfied himself that, on the facts of this case, (and notwithstanding his reservations about DOL investigating the matter), there was no conflict. When the issue was repeatedly raised he put his reasons in a Memo dated October 20, 1992. That memo is appended to this report as Tab 25.

While we have some concern about the awkward position that the PPS was left in by the circumstances of these concurrent investigations, we are not prepared to say that Mr. Pearson was wrong in reaching the conclusion that he did. However, it would be better if the PPS was not put in this position in the first place, something that was easily achievable by the entire investigation being put in the hands of the RCMP.

RECOMMENDATION 3.

We therefore recommend that the Province of Nova Scotia undertake an immediate review of legislation as it pertains to occupational health and safety to ensure that investigations involving serious bodily harm or death are conducted by agencies that are independent of the body charged with ensuring regulatory compliance.

RECOMMENDATION 4.

We therefore recommend that the jurisdiction to investigate industrial accidents be

¹⁴⁸In the case of *Campbell and Shirose v. R. (sub nom. R. v. Shirose)* (1999), 133 C.C.C. (3d) 257, the Supreme Court of Canada concluded that there can be a solicitor-client relationship in existence when the RCMP seek the legal advice of a lawyer employed in the Federal Department of Justice. It is not automatically the case in every instance. Therefore it must be determined whether as a result of the nature of the advice sought by the investigator, and the statutory relationship between the investigator and the Crown, a solicitor-client relationship has been created.

clearly delineated within the relevant statute(s) and that, preferably, it be entrusted to one agency, likely the RCMP.

We acknowledge that industrial accidents often are complex to investigate and specialized knowledge of the area generally lies within the regulating department. It is expected that the outside investigative body would have that expertise made available to them and that it, in turn, would make appropriate use of it.

From November 1992 to April 1993, Chris Morris and Stephanie Cleary continued to work almost exclusively on advising the RCMP in their investigation. Throughout this time they reported generally to Martin E. Herschorn, Q.C., who, at the time, was the Deputy Director of the PPS, reporting to John Pearson.

Mr. Morris and Ms. Cleary communicated with lawyers for Curragh et al. and the Commission of Inquiry on a variety of issues related to the investigation, including issues of search and seizure of documents. They traveled to see the DEVCO mine operations and met with some of its personnel to gain insight into coal mining.

In mid-December 1992, they met with Kenneth Richmond and Steve Farrell who gave them their opinions on a variety of issues surrounding the explosion. It was after that meeting that two potential problems were identified.

First, was the suitability of Mr. Richmond as the primary expert witness for the Crown. It was felt by all present, except S/Sgt. MacDonald, that Mr. Richmond had too little experience in court and that he had difficulties relating his opinions to the provable facts. Concerns were also voiced about Mr. Farrell, but only to the extent that his knowledge and experiences as a mine manager and consultant would not qualify him to speak on the broad variety of issues that the case would present.

This problem was addressed in February 1993, when Chris Morris and Stephanie Cleary met with DEVCO officials and obtained a lengthy list of possible experts. It was in this meeting that the names of Dr. Paul Amyotte and Andy Liney first arose.

One suggestion that was made to the Crown and apparently never followed up¹³⁰ was that they consider retaining a consulting company which, in turn, would assist the Crown to determine what their needs were and then suggest a team of experts to fill that need. This made sense then and, in retrospect, still makes sense.¹³¹

We do not intend to suggest that every case, or even a significant number of cases, that involve employing several experts, require the use of a consultant or consulting firm. Cases of impaired operation of a motor vehicle causing death frequently involve a broad cross-section of expert opinion, such as accident reconstruction, toxicology, emergency room medical procedure and pathology, to name a few. These cases are, however, within the normal range of Crown and police experience. Industrial accidents would not be.

RECOMMENDATION 5.

We therefore recommend that the PPS consider the retention of consultants or consulting firms in cases involving multi-disciplinary fields of expertise outside the normal realm of PPS experience, to assist in assessing and locating appropriate expert witnesses.

The second problem identified by Mr. Morris after the December meeting was that, despite the efforts of the RCMP to obtain and follow expert advice in the underground searches, he could

¹³⁰ In 1993, Mr. Pearson authorized the expenditure of funds for the trial team in place at that time to obtain the services of expert consultants.

¹³¹ Some concern was expressed that the Crown effort to locate or identify suitably qualified experts could be seen as an unwarranted intrusion into the investigation. In our opinion, Crown attorneys would be better qualified to make the professional assessments inherent in determining the likely suitability of experts expected to provide opinion evidence in court.

foresee evidentiary problems arising from the searches of the mine that had been conducted in September 1992.

Both Mr. Morris and Ms. Cleary identified a number of outstanding issues and problems that had to be addressed by the prosecution team. Many of these issues continued to plague the prosecution during the first trial and the efforts of the second prosecution team. They included:

1. Evidence of violations of provincial statutes as evidence of criminal negligence;
2. Deficient equipment as evidence of criminal negligence;
3. Disclosure;
4. Deficiencies in the statements taken by DOL and RCMP investigators;
5. Continuity problems with evidence gathered from the mine;
6. The lack of a complete forensic examination by trained investigators;
7. The validity or value of the post-explosion coal dust samples;
8. The identification of further issues for expert opinion evidence to be sought;
9. Problems associated with proper cataloguing and, in particular, cross-referencing of information in documents, witness statements, and other evidence;
10. Re-interviews of witnesses and further original witnesses;
11. Searches of DOL and other government offices.¹³²

Through the winter months the Crown attorneys researched and prepared opinions for the police on issues such as double jeopardy, issue estoppel, manslaughter, criminal negligence, corporate

¹³² Memoranda dated January 20 and 28, 1993.

criminal liability and search warrants. All of these were intended solely to provide assistance to the police while not getting involved in the investigation itself.

In January 1993, information came to the PPS that the RCMP were intending to lay charges by February 20, 1993. Members of the PPS were very concerned that this was too soon as there was no Crown brief received or reviewed to that point. It was estimated that for the Crown to offer an opinion on whether reasonable and probable grounds to lay a charge existed would take three to six months from the receipt of such a brief. There was a further concern that more investigation might be needed after such a review.

On February 1, 1993, a meeting was held to clarify the RCMP position. It was attended by Supt. Robert Tramley, O.I.C. Truro Subdivision, RCMP; S/Sgt. MacDonald, Sgt. R. Peebles, Insp. Dwight Bishop, Acting Criminal Operations Officer, RCMP; Mr. Morris, Ms. Cleary and Mr. Herschorn. The result of the meeting was that the RCMP, while anxious, in the public interest, to bring the investigation to a conclusion, would not rush into laying charges. They were receptive as well to any recommendation that the Crown Attorneys may have as to further matters might need to be investigated or as to areas where additional expertise might be needed. It would be up to the RCMP whether they chose to act upon those suggestions.

On March 3, 1993, Mr. Pearson advised the Assistant Deputy Minister of Labour of his intention to enter a Stay of Proceedings on the remaining¹³³ provincial regulatory offences. In his letter, Mr. Pearson observed that the RCMP had not yet reached a charging decision on criminal charges, and could not make it before April 19, 1993, the date scheduled for the regulatory offences trial. His opinion was that to proceed with the trial of these charges:

¹³³ The date of first appearance for the provincial offences was December 10, 1992. Mr. Pearson made a formal application to adjourn the taking of pleas from the defendants. When this application was denied, Mr. Pearson entered a stay on 34 out of the 52 charges.

...would give rise to many of the difficulties recognized by the Supreme Court of Nova Scotia Appeal Division in its decision finding that the province had the constitutional authority to establish the Commission of Inquiry but ordering the Commission not to proceed until all outstanding prosecutions are complete.

Mr. Pearson also felt it would be "oppressive prosecutorial conduct" to place the accused in the position of defending themselves in a provincial offence trial, where their choices would be to surrender the right to silence while facing the criminal charge, or not be able to make full answer and defence to the provincial offences.

In his press release announcing the Stay of Proceedings, Mr. Pearson offered as reasons for the decision that to have proceeded would have jeopardized the rights of the defendants guaranteed by ss. 7 and 11 (d) of the *Charter of Rights and Freedoms*. He stated that it was not in the public interest to jeopardize the criminal proceeding; he described it as an "unacceptable risk."

We observe that, in addition to the stated reasons, there may well have been a concern for the availability of prosecution resources. Funding two separate large prosecutions was to be avoided if possible. The more serious charges would be given the higher priority.

Two events would shortly bring the criminal case to a head. The first was an adverse ruling to the Crown on an application pursuant to section 490 of the *Criminal Code*. The second was the withdrawal of Chris Morris and Stephanie Cleary from the file.

Timing of the Laying of Charges

There were five searches of the Westray mine site in 1992. Items seized included coal dust samples.

Detention of items seized as a result of these searches by the RCMP could only be continued in accordance with the provisions of the *Criminal Code* pursuant to which these searches had been conducted. Unless charges were laid, the continued detention of these items for a period greater than three months from the date of the seizure could only be lawful if an application under s. 490(2) of the *Code* was made to a Justice and an Order obtained authorizing continued detention. That application had to be made prior to the expiration of the initial three month detention period - and on proper notice to the owners of the things seized.

Applications to extend the detention were made by Sgt. Peebles and granted, but on February 8, 1993, it was realized that the required three clear days notice of such applications had not been given to Curragh Inc.¹⁵⁴ This meant that the detention of the items seized was not in accordance with the law.

The Crown brought an application before Judge Clyde F. MacDonald of the Provincial Court requesting that detention orders be made for the items seized pursuant to the five search warrants.

Curragh Inc. also brought an application requesting the items seized be returned to it. Arrangements were made to have the two applications heard at the same time.

On March 23, S/Sgt. MacDonald delivered a seven box initial court brief to the PPS. While it was not intended to be complete, it was substantially so.

On March 26, 1993, Judge MacDonald heard the two applications. He ruled that he had no jurisdiction to grant detention orders because the time for applying for them had expired. He also ruled that the items seized pursuant to the warrants be returned to Curragh Inc.

On April 1, 1993, there was a meeting of Mr. Pearson and Chief Supt. Falkingham of the RCMP, at

¹⁵⁴ S. 490(2)(a) *Criminal Code*.

which PPS assistance in framing the wording of criminal charges was requested.

On April 5 1993, C/Supt. Falkingham wrote a letter to the PPS seeking advice on the impact of Judge Macdonald's s. 490 ruling. The questions posed were indicative of the RCMP's concern over the failed detention request. They were:

- 1. Is Judge Macdonald's Order in effect after the 30 days if criminal charges are laid prior to the expiration of the 30 days?*
- 2. If exhibits in question on the sec. 490 matter are returned prior to 30 days and simultaneously seized with a new search warrant, is Judge Macdonald's Order null and void?*
- 3. If an appeal is lodged on Judge Macdonald's decision of March 26 does that cancel Judge Macdonald's Order?*

Mr. Pearson set out the answers to these questions in a letter dated April 13, 1993. The letter also enclosed the response of Gary Holt Q.C., also of the PPS. To the first question, Mr. Pearson indicated that the laying of charges within 30 days would not supersede Judge MacDonald's order to return the seized items within 30 days. In relation to the second question, it was open to the police to return the items and then seize them with a new search warrant. Mr. Pearson pointed out that this could lead to a future challenge that such police conduct amounted to an abuse of process and the seizure might therefore be quashed. Lastly, in relation to the third question, Mr. Pearson advised that an appeal would not immediately cancel Judge MacDonald's order. If successful, an appeal would overrule it. He referred to the provisions of s. 490 which permitted the police to retain the items while an appeal is pending. Mr. Pearson further advised that the PPS had concluded that an appeal should be launched from Judge MacDonald's decision.

Mr. Pearson's letter also included suggested wording for the Information to be laid. This was based on what he understood to be S/Sgt. MacDonald's view of the evidence.

On April 19, 1993, Mr. Felderhof and Mr. Theuerkauf of the PPS reviewed the Information but had insufficient knowledge of the facts to offer significant input to its drafting.

The RCMP proceeded with the laying of the Information on April 20, 1993. It was not the wording proposed by Mr. Pearson, although the differences were not significant.

The section 490 issue was one that was neither complex nor novel. It was embarrassing to the RCMP and to the PPS. The RCMP felt that they were ready to lay the charges. Judge Macdonald's decision likely contributed to the acceleration of the laying of charges.

Resourcing

From the outset, Mr. Morris and Ms. Cleary indicated the need for adequate office space dedicated to the Westray prosecution and sufficient for such a voluminous file. They also needed a secretary and computers. By December 1992, they identified a need for a third Crown Attorney. For them, the perceived lack of responsiveness to their resourcing needs was the single most significant factor in their decision to formally request to be relieved of their responsibilities for the case.

Four questions arise from this background:

1. Were the requests for resources reasonable?
2. What attempts, if any, were made to obtain the requested resources?
3. What were the reasons for the delays in granting PPS resource requests in 1992-1993?
4. What impact, if any, did the resources question have on the ultimate outcome of the case?

1. Were the request for resources reasonable?

At the root of any assessment of reasonableness must be an understanding of the task that had been

assigned. In brief, a team of 13 investigators, operating out of Truro, had interviewed over 130 witnesses, seized hundreds of thousands of pages of documents and, employing their own computers, software and personnel, had organized the accumulated information.

The RCMP allowed open access to their investigation to the Crown Attorneys and, in fact, Mr. Morris spent many hours traveling from his home, in the Halifax area, to Truro and to New Glasgow for the purpose of meeting investigators and reviewing the evidence.

The request put forward was for 300 square feet of space which, in the two prosecutors' view, would be adequate, but not large, for two lawyers to work in with the amount of material that would reasonably be expected to occupy the space.

The RCMP had already brought in information technology people to develop a cataloguing system for the materials being gathered by the investigators. Their in-house experts in this area made recommendations to the Crown in the fall of 1992 as to the type of computers needed by them to make use of the same software and thus have access to the investigative material. The total cost estimate was \$4,000. In view of the significant expenditures in the operation of the Inquiry, the RCMP investigation, the DOL investigation and the commitment of two Crown Attorneys, this was a paltry sum to ensure that the prosecutors had available a basic tool for their task.

At one point in November of 1992, the RCMP informally offered to loan a computer to the team, an offer which was not taken up. It was some time before a computer was actually obtained and made available to Mr. Morris and Ms. Cleary. It was both reasonable and necessary that they receive computers in a timely fashion.

Discussions about the need for a third Crown Attorney to assist in the precharge advice stage began in mid-December 1992 with a meeting of Mr. Morris and Mr. Pearson. At that time it became evident that Ms. Cleary, who was still working on another large case, should be assigned to

Westray alone and that a third attorney be added.

On January 20, 1993, Mr. Morris sent a memo to Mr. Herschorn citing the need for such a person. He met with Mr. Herschorn on February 12, 1993, to discuss the issue. On February 17, 1993, he again met Mr. Herschorn to advise that he was feeling overwhelmed by the volume of documents. He raised the issue of the need for a consultant to help organize and manage the file. On February 23, 1993, he met again with Mr. Herschorn. He notes that RCMP investigators were estimating that as much as 500,000 pages of documents could be involved in the file.

Support staff were needed to assist in file organization and typing of the written advices being prepared by the team. Whether that staff needed to be full time and dedicated to the work on the Westray case is difficult to assess. Certainly, some help was required and provided, but had office space and computers been provided in a more timely manner, the need for full-time support staff may not have been as great as the perception at the time.

2. What attempts, if any, were made to obtain the requested resources?

On July 31, 1992, Mr. Pearson prepared a memorandum to the Senior Management Committee of the Department of the Attorney General of Nova Scotia soliciting its support for a request to Management Board for additional resources for the PPS to handle complex prosecutions. Reference was made to the Westray prosecution.

After receipt of the DOL investigative brief and request for advice on August 24, 1992, the PPS intended to use two experienced Crown Attorneys for precharge advice to the investigative agencies. When it was decided that these two persons would come out of the busy Dartmouth office, it was apparent that their positions would need to be back-filled. On August 24, 1992, a submission was sent to the Management Board for the Province requesting funding for two casual positions.

At its September 9th meeting, Management Board "stood" the request, i.e., it was neither approved nor rejected. This generated a memorandum from Mr. Pearson to Deputy Attorney General D. William MacDonald dated September 10, 1992. In it, he set out the demands that the Westray case was putting on the PPS and closed by saying:

There will be an unavoidable time lag between approval of our request by Management Board and the the starting date of the casual employees. The delay we are encountering at Management Board is having a serious effect on our ability to provide prosecution services with respect to an extremely important file. Any assistance that you or the Attorney General can provide in this matter would be appreciated.

(emphasis added)

On September 14, 1992, a letter was sent by Clarence Guest, Director of Finance, to Robert Fowler, a Policy Director with Management Board, requesting approval for an additional 300 square feet to the Terminal Road offices of the PPS to accommodate the Westray Crowns. The refusal of this request was communicated by a letter of October 15, 1992, from the Deputy Minister of Management Board, D.T.Tobin, to the Deputy Minister for the Attorney General. No reason was given for the refusal. Mr. Tobin indicated that he was sending the letter on the instruction of "the Chairman of the Space Utilization Committee."

There appears to have been some confusion about what the use of the 300 sq. ft. office was to be. Mr. Tobin's letter refers to a refusal of the request to "accommodate two Crown Attorneys (casual) associated with the *Westray Inquiry*."

On October 27, 1992, Mr. Pearson sent a letter to Mr. Fowler restating the case for the requested office space. He pointed out that the request had nothing to do with the *Westray Inquiry*.

It appears that there had been an offer of space adjacent to the solicitors working on the Westray file for the Legal Services side of the Department of AGNS. This was not considered appropriate

by Mr. Pearson. In this letter he also referred to the need for separation of the Westray Crowns from those solicitors. He wrote: "Physical separation avoids the suggestion that the lawyers of the Legal Services Division and the Public Prosecution Service have exchanged information on these files."

On November 19, 1992, Mr. Pearson sent a memorandum to the Deputy Attorney General which set out the resource deficiencies of particular concern to the senior staff of the Public Prosecution Service. It spoke of the increased caseloads, an understaffed Special Prosecution Unit, the shortage of attorneys in Halifax and in the Central Region as well as in support staffing of different areas. The demands of the Westray case are included in this assessment. The memo concludes:

We recognize the province is facing great economic pressures and very difficult decisions must be made. However, in our considered opinion, failure to address the deficiencies we have identified will inevitably result in the quality of the prosecuting services we deliver falling below acceptable levels. Public confidence in the criminal justice system will be seriously eroded if resource deficiencies result in improperly prepared and conducted prosecutions.

(emphasis added)

In the interim, the "Space Utilization Committee" of Management Board reconsidered the request for the additional office space, and once again Mr. Tobin communicated to the Deputy Attorney General the refusal of the request. This letter was dated December 8, 1992. This time, specific reference was made to the availability of space for the prosecutors to work within the offices of the AGNS. It acknowledged that this space would put the Westray Crowns in a separate place from the other PPS offices.

On December 21, 1992, the request for two casual Crown Attorneys (to fill the positions vacated by Mr. Morris and Ms. Cleary) and a casual secretary again went to Management Board.

In the meantime, Mr. Morris and Ms. Cleary were very concerned about the government attitude toward funding the prosecution. They had not gotten computers, an office or support staff. Their notes reflect that they began to question whether they would have funding for the needs of the case, such as, for instance, expert witnesses.

A pointed memo dated January 13, 1993, was sent by Mr. Pearson to the Deputy Attorney General asking for the personal intervention of the Attorney General to seek Management Board approval of the resourcing requests. In it he notes that the request had been stood at two successive meetings of the Board. He cites the pending provincial statute charges, not yet stayed, set for trial in April 1993, and the inappropriateness of Mr. Tobin's last suggestion that the Westray Crowns occupy the office space within the offices of the AGNS. He added:

I also attach herewith a copy of a letter to you from Mr. Tobin advising that the additional office space we requested to house the Crown Attorneys assigned to the Westray Coal Mine disaster has been rejected. The letter suggests the Crown Attorneys be housed within the offices of the Department of the Attorney General. With the greatest of respect to Mr. Tobin, his position reflects a fundamental misunderstanding of the prosecutorial regime established by the Public Prosecutions Act. This legislation requires an independent Public Prosecution Service. The Crown Attorneys in question have been assigned to provide advice to the RCMP with respect to a criminal investigation into the Westray Coal Mine disaster. The RCMP investigation is required to examine the conduct of everyone involved in the disaster, including provincial government officials and departments. These officials and departments are represented by lawyers of the Legal Services Division of the Department of the Attorney General. In my view, RCMP and public perception of the independence of the advice the police are receiving from the Public Prosecution Service would be seriously damaged by adopting Mr. Tobin's proposal.

He concluded:

Unless the Attorney General can persuade his cabinet colleagues on Management Board to provide the Public Prosecution Service with the modest resources we have requested to do a very large job, I fear the Public Prosecution Service will be unable to satisfy its statutory mandate in these very important cases.

(emphasis added)

Mr. Pearson and Mr. Herschorn met with the then Attorney General, the Honourable Joel R. Matheson, Q.C., on January 26, 1993, to express personally their concerns over the Management Board's deferral of resource requests coming from the PPS.

By letter dated February 1, 1993, to the Attorney General, Mr. Pearson reiterated the PPS position and provided detailed reasons for their concern.

The letter concluded:

Public confidence in the administration of justice will suffer if the Crown is not ready to proceed in a timely fashion with these cases. We cannot proceed with inadequately prepared cases. The public is entitled to properly prepared and effectively presented prosecutions. Without additional resources we will be unable to fulfill our statutory mandate.

Mr. Pearson wrote a further letter on February 1, 1993, to the Attorney General to explain the reasons for the request for separate office space, the concern that the PPS had about the refusal of the request, and finally to ask the Attorney General to intervene with the Space Utilization Committee in the matter.¹⁵⁴

¹⁵⁴ Copies of both letters, dated February 1, 1993, are appended in Tab 26 and 27.

As noted earlier, the requests for casual positions to backfill the positions left vacant by Mr. Morris and Ms. Cleary working on Westray had been re-submitted on December 21, 1992. They were approved on February 16, 1993. Although this was a welcome development it did not alleviate Mr. Pearson's concerns about the government's response to the resourcing requests.

The timing of this was important. It had been less than three weeks since the meeting with the RCMP to ensure that criminal charges were not laid precipitously. It was apparent that these resource requests were only the beginning of the needs for the PPS to properly be able to handle precharge advice and ultimate prosecution of the criminal charges that were anticipated.

On February 22, 1993, Stephanie Cleary and Chris Morris sent a memorandum to Mr. Herschorn, with copies to six other management or senior Crown Attorneys. It was a formal request to be removed from responsibility for the Westray file. They recited the extensive nature of the file and the fact that they had been spending a good deal of their time simply trying to obtain the required resources. They pointed out that for the RCMP to be properly advised, and for the charges to be properly prosecuted, the file would require, at minimum:

1. An experienced file manager. By this we mean a senior member of the bar with extensive litigation experience. We clearly do not have the experience to manage a file of this nature alone.
2. At least four Crown Attorneys to deal with the facts, legal research, and court duties.
3. Proper physical resources including offices, desks, filing cabinets, telephones, and computer equipment.
4. Full time support staff. At the minimum one full-time and one part-time secretary, each with proper computer equipment.

5. Because of the amount and complexity of the evidence, it may also be advisable to have a librarian assigned to the prosecution. This would be similar, of course, to the situation of the Westray Mine Public Inquiry, where a full-time librarian was employed by the Commission. It is noted that the RCMP now have all the documents originally held by the Commission.
6. Budgetary and policy control for the file must rest within the Public Prosecution Service, so that the Service does not have to go cap in hand to the government, which is itself a suspect in this case, to obtain other physical and personnel resources which may be required as matters unfold.

Mr. Morris and Ms. Cleary concluded that they were incapable of continuing on the file. To do so would amount to a breach of their ethical duties.

Not only was Mr. Pearson dissatisfied with the governmental response to date, he now had the two Crown Attorneys who had been assigned to handle precharge advice ask to be reassigned due to the size of the file and the lack of resources to properly handle the case. Time was running out for the PPS to be ready for what seemed sure to come.

On February 26, 1995, Mr. Pearson met with Mr. Tobin and Deputy Attorney General MacDonald to get their input on how to generate a positive response to his requests. Immediately after the meeting, he wrote a detailed letter to the Attorney General. The purpose was to "give ... a status report on the Westray criminal investigation and to provide ... [Mr. Pearson's] assessment of the immediate and long term resource implications for the Public Prosecution Service of this investigation and the criminal charges which will result from it." A copy of this letter is set out at Tab 28.

The letter explicitly set out the potential courses of police action and the responsibilities of the PPS to respond. It pointedly stated what the expectations of the public may reasonably be of the PPS. It compared the under-resourcing of the PPS to that date with the significant resource allocation to the Commission of Inquiry. It continued with a particularly accurate assessment of the longer term needs of the PPS to meet its obligations in the event of charges being laid. Mr. Pearson wrote:

There will be constant, intense pressure on us to discharge our prosecutorial responsibilities quickly. We will have to resist the pressure and do our job in a manner consistent with our responsibilities to the accused and to the public.

The letter then set out the "immediate needs" for the PPS to be able to deal with the pending brief from the RCMP:

1. *Four Crown Attorneys, one of whom is an experienced commercial crime file manager;*
2. *One full time secretary and one part time secretary;*
3. *One paralegal/librarian to manage the avalanche of paper the RCMP are about to unleash on us;*
4. *Computer equipment for each of the support staff; and*
5. *Appropriate physical resources, including offices, desks, filing cabinets, telephones and computer equipment.*

Mr. Pearson concluded that a "different resourcing mechanism must be devised for resourcing this major undertaking," and that "The RCMP will not and the court system cannot wait while we go through a protracted approval process."

A March 1, 1993, meeting of Mr. Pearson, Mr. Herschorn and the Attorney General concluded in the latter providing his personal support to a submission to Management Board for approval for a paralegal/librarian, a half-time secretary, and a further Crown Attorney. These requests were approved on March 9, 1993.

On March 2, 1993, the Space Utilization Committee approved the allocation of office space.

On March 17, 1993, PPS management announced to the legal staff of the PPS that approval had been received for four Crown Attorneys supported by a paralegal/librarian and dedicated secretarial support with computer work stations and office space. It was anticipated that the team of four Crown Attorneys would be committed to this file for a period of up to four years. In recognition of the additional commitment of overtime and travel, the PPS announced they would be seeking reclassification for Crown Attorneys who took on this demanding file.

3. What were the reasons for the delays in granting PPS resource requests in 1992-1993?

We observe at the outset that criticisms leveled at the *PPS management* for under-resourcing the prosecution team in the first 10 months after the explosion are unfounded, as the above chronology makes clear. Mr. Pearson was a new person in the public service of the Province of Nova Scotia as head of a very new Public Prosecution Service. His approach to seeking the needed resources was a reasoned one. He started with the bodies that had the direct control over the allocation of the funds and the space. When that failed, he went to the Deputy Ministers within whose responsibilities such allocations fell. Finally, and as a last resort in the face of the RCMP being ready to lay charges, he went to the Attorney General to seek his personal intervention. He put forward his requests in a timely and persistent manner. Why his requests were not heeded earlier is a more difficult question.

In speaking with Mr. Pearson, it is our impression that there was a significant lack of understanding of the PPS, its role and its needs, by the powers that considered their requests. He noted for us that, until his meeting with the Deputy Attorney General and Mr. Tobin on or about February 26, 1993, he had not couched his requests in terms that non legally trained persons might genuinely appreciate the seriousness of the situation that was developing. Confronted with many demands

from many quarters for a limited supply of money, the civil servants considering such requests as space allocation did not understand why, what appeared to them to be perfectly suitable and unused space next to the Legal Services lawyers working on Westray, would not also be appropriate for PPS lawyers working on Westray. The politicians' response is more difficult to understand.

As noted earlier, when Mr. Pearson sent his letter of February 26, 1993, to the Attorney General, he made some pointed observations, including:

The media will question whether the government has allocated sufficient resources to the task. Shortly after the Westray disaster, the Premier publicly stated no expense would be spared to appropriately respond to the disaster.

He went on to point out that to that time the Inquiry spent \$1.1 million in its first eight months, had a full-time librarian and three law clerks supervised by two lawyers. The lawyers' accounts to that time were approximately \$280,000.00. He continued: "The media will ask if comparable resources have been allocated to the criminal prosecution."

It is apparent that significant resources were allocated to the Commission of Inquiry, to the DOL investigation of the provincial statute offence allegations, to the RCMP and to the preparation of the governmental response to the Inquiry, including the funding of separate legal counsel for a number of governmental employees to be questioned in relation to Westray. The only party to the matter having funding difficulty was the PPS.

In view of the fact that the Commission of Inquiry's mandate was so broad that any embarrassment to government from its handling of Westray in the years leading up to the explosion was certain to be exposed, it is completely improbable that there was a conscious effort to stymie the PPS. Instead, Mr. Pearson's assessment is probably correct; that there was a significant lack of understanding of the PPS' position until it was spelled out so clearly to the Attorney General in February 1993. After that, resourcing was rarely an issue.

The wisdom of special budgetary provisions for such future special prosecutions is apparent. It ensures that the decisions rest with the PPS and removes the potential for accusations of governmental influence in potentially embarrassing prosecutions.

4. What impact, if any, did the resourcing problems in 1992-1993 have on the ultimate outcome of the case?

We are of the opinion that despite the deplorable inattention paid to the PPS' funding needs for Westray in 1992 and early 1993, there is little to suggest that it had a direct impact on the future handling of the case. This is by no means an endorsement of what happened in response to the requests of the DPP in that time frame. Neither are we saying there was no effect because there was.

In his letter of February 26, 1993, Mr. Pearson wrote to the Attorney General:

At some point in the next two months the RCMP will do one of two things. Hopefully, they will provide the court brief to the Public Prosecution Service and request an opinion as to whether their investigation discloses reasonable grounds on which to proceed with criminal charges. To provide a competent, professional opinion on this issue, the results of the RCMP investigation will have to be digested and numerous complex legal issues researched and resolved. Only after a thorough review will it be possible to provide the RCMP with competent legal advice concerning who should be charged and with what.

If the RCMP conclude we are unable to provide them with advice in a timely fashion, they will proceed with charges without advice. If they do this, our first task will be to determine whether there is evidence with respect to each essential element of the offences charged and a reasonable chance of obtaining a conviction. In a case of this magnitude, a substantial period of time will be spent performing this necessary function. The Charter of Rights and Freedoms clock will start running the moment the charges are laid. The defence will demand the earliest possible date for a preliminary inquiry.

Regardless of which scenario unfolds in the next two months, one thing is certain, public attention will be focused on our response to the challenge presented by this case.

The scenario which unfolded in the next two months was that the RCMP laid charges without waiting for a new prosecution team to get up to speed on the file.

When Mr. Morris and Ms. Cleary were appointed to provide precharge advice to the investigators it was also an opportunity to learn the file. They did not have the opportunity to accomplish that task in a meaningful way.

Mr. Pearson advises us that it was his intention to employ Mr. Morris and Ms. Cleary, not necessarily to conduct any subsequent trial that could take place, but rather to give advice, know the file and be able to offer opinions as to the appropriateness of charges, the likelihood of conviction, and who the accused might be. In the time they worked on the file, they were primarily occupied with providing legal advice to the investigators. They had neither the time nor the resources to familiarize themselves with all of the evidence and carry out an assessment.

By February 22, 1993, they found the situation untenable and requested that they be relieved of their positions for the file. Over the next two weeks, they were reassured that positive things were starting to happen with the resourcing requests to government. They were unconvinced. Ms. Cleary never changed her mind. She wanted to be taken off the file. Mr. Morris eventually did offer to return to work on the case. The offer was not accepted and a new team would soon be in place.

It is apparent that the DPP has the authority to direct that a Crown Attorney act on a file. Given the depth of frustrations expressed by Mr. Morris and Ms. Cleary, which had become public in a March newspaper article, it was Mr. Pearson's assessment that it was better to start afresh. That, however, was not a simple undertaking.

As noted earlier, on March 17, 1993, Mr. Pearson circulated a memorandum to all Crown Attorneys in the province seeking expressions of interest in becoming part of a new four-person team to give precharge advice and to conduct a subsequent trial of criminal charges. Reclassifications (for increased salary) were hoped for and there was to be appropriate support staffing. There was little response. The lack of response was, no doubt, at least in part due to the perception created by the initial funding problems that it was a prosecution that had not, and likely would not, have proper resourcing.

It was April 19, 1993, before a team was in place. The RCMP laid the Information charging Curragh Resources, Roger Parry and Gerald Phillips with *Criminal Code* offences on the next day, April 20, 1993. The opportunity to have significant precharge input by the PPS was gone. The opportunity to be ready for the prosecution of the largest criminal case in the history of Nova Scotia also was gone.

The role that delays in resourcing the prosecution played was indirect. In our opinion, the role of underresourcing did not have a direct causal connection for the ultimate failure to bring the criminal charges to a conclusion on their merits. We cannot say that it did not have an impact. The manner of that impact and its significance will be discussed in a separate section of this report.

April 1993 - October 1993

As noted previously, volunteers did not initially come forward to staff this prosecution. Mr. Pearson personally met with and asked a number of people in the PPS to be a part of the Westray prosecution team. He was turned down for reasons that included a reluctance by prosecutors to take on the commitment that the case would require and/or to relocate families to Pictou County or, alternatively, to be away from home for extended periods of time. Fears of underresourcing also lingered though Mr. Pearson assured staff that that was no longer a problem.

Mr. Pearson eventually found a solution. Two offices were set up, one in New Glasgow manned by Mr. Felderhof and Mr. Rosinski, both already based in that area; the second, in Halifax, to be occupied by Mr. Theuerkauf and, later, Andrew Macdonald.

Of the four Crown Attorneys who came on the file, Mr. Felderhof, as the most senior member, was the team leader. Mr. Pearson conferred with S/Sgt. MacDonald who agreed with this appointment as being appropriate. S/Sgt. MacDonald was familiar with Mr. Felderhof and confident that they would work well together.

Mr. Felderhof had an undergraduate degree in soft rock geology, obtained in 1972 . He had later gone to Law School and was admitted to the Nova Scotia Bar in 1978. He joined the New Glasgow office of the Crown Prosecutor's office in 1981, where he carried out the normal duties attached to that position. He had not had training or experience in the management or conduct of a file as large or as complex as the Westray case. In 1988, he had worked on a special project relating to the seizure of illegal video lottery machines and the prosecution of the individuals charged arising from those seizures. It cannot be compared with the Westray case in terms of the demands each made on the Prosecution Service. Mr. Felderhof did not have computer training, nor had he acted on appeals in relation to indictable criminal offences.

Peter Rosinski had been admitted to the Nova Scotia Bar in 1987 and, after a short period in private practice, joined the New Glasgow Crown office in October 1989, giving him approximately three and a half years as a Crown Attorney when he started work on Westray. He agreed to work on the file knowing that he would be working with Mr. Felderhof with whom he was already familiar and comfortable.

Art Theuerkauf was the second most senior member of the team. He was admitted to the Bar in 1984 after earlier working with the RCMP for 8 years. He practiced as a defence attorney with

Nova Scotia Legal Aid, and in private practice, with a 4-year stint in between as a Crown Attorney. He rejoined the Crown office in 1991. He had no large case experience.

On April 19, 1993, the day before the laying of the Information by the RCMP, Mr. Felderhof and Mr. Theuerkauf had an opportunity to review the Information setting out the *Criminal Code* charges against Curragh Inc., Gerald Phillips and Roger Parry. They had no knowledge of the file upon which to provide a critical assessment.

The first meeting of the new team took place on April 23, 1993. John Pearson, Martin Herschorn, Gary Holt (Senior Crown Attorney, Special Prosecutions Unit), Herman Felderhof, Art Theuerkauf, and Peter Rosinski attended. A number of issues were discussed. Some of those may be summarized as follows:

1. Regular Meetings: It was agreed to hold regular meetings.
2. Additional Crown: Mr. Pearson had earlier interviewed Andrew Macdonald for a possible position on the team. The new team did not have sufficient knowledge of the contents of the file to know whether they needed another Crown. Nevertheless, a second interview was to be set up with Mr. MacDonald.
3. Support Staff:
 - (a) The need for a legal research assistant was discussed but tabled to a future meeting.
 - (b) A decision was made that 2 full-time secretaries (one for Halifax, the other for New Glasgow) were needed instead of the 1.5 already approved by Management Board;
4. Reclassification: Temporary reclassifications of the team members was approved. Each was given a two-step increase in the MCP rating resulting in approximately \$4,000 per year annum increases in salary for each of the attorneys. This was to recognize the increased workload, expenses and loss of family time that was expected to result from participation as a team member.
5. Disclosure: The meeting was advised that Robert Wright, legal counsel for Mr. Parry, had

made a verbal request for disclosure to his client of the Crown materials. The team would do so after a written request was received, and then on the understanding that only one copy would be given. If Mr. Parry changed counsel, the accused would be obligated to ensure that new counsel received disclosure from the previous one.

The team scheduled a meeting with S/Sgt. MacDonald for April 27, 1993. They agreed that the topic of the meeting would be disclosure. Mr. Theuerkauf told the team that he had spoken to S/Sgt. MacDonald and was advised by him that

the police have a master index which includes a listing of all documents in the court brief, together with exhibits, photographs, statements, ... each time a new exhibit or statement ... is produced, the master index list will be changed and a copy provided to each of the participating parties.

The team agreed that they wanted to achieve "uniformity" of disclosure when they discussed the topic with S/Sgt. MacDonald.

6. Computers: The team requested computers and training for themselves and their secretaries to use them.

The team met on April 29, 1993. They agreed that they needed a fourth lawyer and arrangements were made to interview Andrew Macdonald. They soon became aware of the magnitude of the file and took steps to have their current case load reassigned.

The same day they met with S/Sgt. MacDonald who briefed them on the issue of disclosure. It is noted in the minutes of this meeting:

Herman expressed a concern that we ensure disclosure uniformity to all accused. Ches explained that the computer system that the RCMP had incorporated for the purposes of this file virtually assures that concern.

The program has a master list which can be accessed a number of different ways; as well, should any further investigation take place which would necessitate ongoing disclosure the format allows for the addition of new materials and new indices to be provided, together with the new materials, to all accused. It also allows the crown and the police, and the defence to be on the same footing with respect to what had been disclosed and what is not considered relevant.

(emphasis added)

The team were then given a demonstration of the computer system. This lead them to conclude they would require a computer in the courtroom, and that they would require training on how to use the program.

Andrew Macdonald read about the formation of a prosecution team for the Westray case in the newspapers and contacted John Pearson in April 1993 to inquire about a possible position with the team. He was initially interviewed by Mr. Pearson and Art Theuerkauf. On April 30, 1993, he was interviewed by Mr. Felderhof, Mr. Rosinski, and Mr. Theuerkauf. He joined the team on May 17, 1993, as a "casual" employee of the Public Prosecution Service. Mr. MacDonald was the most junior of the team, having been admitted to the bar in 1989. He too had an undergraduate degree in geology. He had practiced law in a private firm for a period of time following admission to the Bar. Mr. MacDonald was the team member considered by other team members to have the best computer skills among them.

All members of the team met with Mr. Pearson on May 17, 1993. The issue of the disclosure obligations regarding the DOL investigation of provincial offences was discussed. Mr. Pearson reported to them that the three-volume Crown brief from the DOL investigator, Harry Murphy, was disclosed to the defendants during the prosecution of the provincial offences, but that the initial brief and a subsequent report by Mr. Murphy regarding requests for particulars were not disclosed as these items contained no evidence but were an organization and summary of the evidence which could be presented on the provincial offences. As such, he questioned whether they were really

relevant insofar as disclosure was concerned. However, Mr. Pearson also expressed the view that it was best that the defendants receive everything that the PPS could legitimately disclose to them. They identified the existence of some materials that may be in the possession of the civil side lawyers of the Attorney General's department that had been gathered in the course of their representation of the Department of Labour. Although no clear conclusion was reached, the issue had earlier been dealt with by Mr. Pearson in writing to counsel for the defendants in the provincial prosecutions that materials in the possession of the Department of Labour and other government departments were not "in the possession of the Crown" and that they should approach the government departments for access.

The arraignment of the accused took place in Provincial Court on May 25, 1993. At that time defence counsel made gave notice of a motion to quash the Information sworn April 20, 1993. The date of July 20, 1993, was set to argue the motion.

The team members familiarized themselves with the court brief that had been provided by S/Sgt. MacDonald. They took steps to set up the necessary offices in Halifax and New Glasgow. Mr. Pearson assured them that a budget had been set for the Westray prosecution and that the Attorney General had been briefed on the resource requirements. They were assured by Mr. Pearson that they should not worry "one iota" about the cost of bringing witnesses to court. Their own out-of-province travel, however, would have to be approved in advance.

The accused returned to Provincial Court on July 20, 1993, at which time Judge Patrick Curran granted the defence motion to quash the Information. The judge accepted the argument that both charges were fundamentally deficient in that they alleged that things happened or didn't happen over an eight-month period without giving any real indication to the accused of what those things were.

On that same night the team met to discuss whether to appeal Judge Curran's decision or to draft a

new Information. They chose to lay new charges. They worked on the drafting of the new Information over the next two days and the new Information was laid in New Glasgow on Friday, July 23, 1993.

On July 26, 1993, the team met with 35 members of the families of the deceased miners. The Crown Attorneys answered many questions about the process, and they responded to accusations that there was an unknown power tying the hands of the prosecutors by underresourcing the prosecution. Reference was made to the fact that Mr. Morris and Ms. Cleary had quit the case for that reason. The families were assured that was not an issue. The families were also concerned with the decision not to charge employees of the DOL.

In meetings with Mr. Pearson, the team reported that they had reviewed the evidence of criminal negligence and all were satisfied as to the existence of "good evidence." Mr. Pearson approved their request in principle to seek and retain experts from Britain. The team also held meetings with Dr. Paul Amyotte and Mr. Kenneth Richmond.

The accused were arraigned in Provincial Court on the new Information on August 17, 1993. Defence counsel once again made a motion to quash the Information. Written briefs were prepared and filed and the date of October 26, 1993, was set for decision on the motion.

In the fall of 1993, the team advised the RCMP that, in their opinion, there was no reasonable likelihood of conviction in relation to charging the employees of the Department of Labour. The team further decided to defer further meetings with expert and non-expert witnesses until after the scheduled date of the decision on the outstanding motion to quash.

On October 26, 1993, Curran Prov. Ct. J. released his written decision on the application brought by the defence to quash the charges. The basis of the application was that the charges as laid were legally and factually insufficient and unconstitutional. The judge concluded that both the

manslaughter and the criminal negligence charges were valid on their face and that any constitutional challenge would have to be brought before another court since there was nothing in the *Criminal Code* that gave to him authority to decide that issue. He did note that the constitutional question regarding provincial offences as constituting sufficient underlying unlawful acts for the offence of manslaughter appeared to have been settled by the Supreme Court of Canada in *R. v. DeSousa*.¹⁵⁸

The following day the team met to discuss the decision of Judge Curran and to prepare work assignments. One of the concerns that the team wanted to address with Mr. Pearson was the fact that Andrew Macdonald's contract was set to end in May 1994, and that one of their secretaries, whom the team considered to be particularly competent in file organization and computer skills, was on a contract set to expire on December 31, 1993.

November 1993 - May 1994

On November 3, 1993, Mr. Phillips elected trial by judge and jury. The date for the preliminary inquiry was set for March 28, 1994. It was anticipated by the Crown that the preliminary inquiry would take 3-4 months to complete.

Although Mr. Parry had counsel assisting him up to that time, it was on a limited retainer and did not include representing him at a preliminary inquiry. Election and plea for Mr. Parry was adjourned to December 2, 1993. When Mr. Parry appeared on that date, he still did not have counsel. Apparently Nova Scotia Legal Aid had turned down his request to represent him. On being put to his election, Mr. Parry expressed the desire to be tried by judge alone. Judge Curran declined to record a different election for Mr. Parry and required that the charges proceed in the same fashion against all accused and entered an election for trial by judge and jury. The preliminary inquiry date of March 28, 1994, would apply to all accused.

¹⁵⁸ (1992), 76 C.C.C. (3d) 124.

Curran Prov. Ct. J. wrote to Mr. Felderhof, to Mr. Parry, and to counsel for Mr. Phillips, a letter on December 13, 1993, about scheduling of the preliminary inquiry. Of particular interest was the concern he raised that Mr. Parry did not yet have counsel for the preliminary inquiry. He cautioned:

I consider it essential that the individual defendants be represented by competent counsel at the Preliminary. The charges and the potential penalties attached to them are so serious and the case is so complex that no lay person could be expected to represent himself unless he insisted upon doing so. I don't know Mr. Parry's financial circumstances, but I do know that only the wealthiest of persons could afford to hire a lawyer for this case. In my view, it would be a travesty of justice comparable to the Donald Marshall matter if Mr. Parry were forced to proceed without a lawyer. I have no intention of presiding over a travesty of justice. The Provincial Government is spending hundreds of thousands of dollars per year on the prosecution of this case. It is entirely proper that it do so. However, it must also do whatever is necessary to see that justice, and not just prosecution, is carried out.

I leave these matters in your hands.

(emphasis in original)

The Public Prosecution Service had no direct avenue to remedy Judge Curran's concern. Mr. Pearson wrote to the Attorney General identifying the problem and the ramifications should Mr. Parry not have counsel at the preliminary inquiry. Some of the consequences that were identified were: an adjournment of the preliminary inquiry or Judge Curran assuming jurisdiction to grant *Charter* relief to Mr. Parry.

The Crown team continued to work with S/Sgt. MacDonald regarding further witness interviews to be done. They requested expert reports from Dr. Paul Amyotte, interviewed witnesses from the Department of Labour inspectorate, and traveled to the United Kingdom to interview prospective expert witnesses: Andy Liney on ventilation and Bruce Staley with respect to safe mining practices. Members of the team also traveled to the western provinces to interview former Westray employees.

By February 1994, it appeared to the trial team that it seemed likely that the preliminary inquiry would not proceed as scheduled.

Disclosure

As noted earlier, it was during this time period that the disclosure process began. It is, therefore, appropriate to set out how information and material was collected, catalogued and subsequently disclosed to the accused. In addition, a brief description of the principles surrounding disclosure is appropriate.

The leading case in Canada on disclosure is *Stinchcombe v. The Queen* (1991), 68 C.C.C. (3d) 1 (S.C.C.). The accused had been convicted of 13 charges of criminal breach of trust. A former employee of the accused was a Crown witness at the preliminary inquiry. She gave evidence that was favourable to the accused. After the preliminary inquiry, but prior to trial, she was interviewed by a police officer and a recorded statement was taken. The Crown advised the defence of the existence of the statement, but not the content. Requests for disclosure of the statement were refused. During the trial, the former employee was again interviewed by a police officer. Requests for disclosure of this material was also refused. The Crown indicated that they would not be calling the former employee as a witness as she was not credible. The former employee refused to be interviewed by the defence.

Sopinka J., in writing the unanimous decision for the court, directed a new trial. He held that, in the circumstances, the non-production of the statements was an important factor in the decision of the defence not to call the former employee as a witness and that the absence of this evidence may well have affected the outcome of the trial.

The decision of the Supreme Court of Canada in *Stinchcombe* established a host of important

propositions. Among them were:

1. The obligation of the Crown to make disclosure where an accused is represented by counsel is triggered by a request by or on behalf of the accused.
2. Disclosure should be made before an accused is called upon to elect his or her mode of trial or to plead. If the request for disclosure has been timely, it should be complied with so as to enable the accused, before plea or election, to review the information disclosed.
3. The Crown's obligation to disclose is a continuing one, and disclosure must be made with respect to any additional information.
4. The fruits of the investigation, which are in the possession of the Crown, are not the property of the Crown for use in securing a conviction, but are the property of the public to ensure that justice is done.
5. The general principle is all relevant information must be disclosed whether or not the Crown intends to introduce it into evidence; that is, the Crown must disclose all relevant information, whether it is inculpatory or exculpatory, and must produce all information which may assist the accused.
6. The Crown has a discretion, that is reviewable by a trial judge, with respect to the relevance of information. The Crown should err on the side of inclusion, but it need not produce what is clearly irrelevant.
7. Defence counsel has a duty to bring any non-disclosure to the attention of the trial judge as soon as he or she is aware of it.¹³⁶

¹³⁶ See also *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.)

Items seized by the RCMP during their investigation were entered on a RCMP total exhibit list. This list gave a description of the item, where it was seized and who seized it. In light of the volume of the material gathered in the investigation, the RCMP turned to its computer experts to provide advice on how to organize and catalogue the documents and information being gathered. It was recommended that they use a software program called 'Q & A.' This program sets up a database that is somewhat equivalent to a catalogue card system. Information is entered into the program, including a brief description of the document or exhibit, a Q & A identifier number, the RCMP total exhibit list number, where the exhibit was located, the date of the document, the author, who received it, and the name of the witness who would introduce the exhibit at trial. The RCMP entered information in the Q & A database that they considered relevant. Anything that had a Q & A number, which was capable of being photocopied, was reproduced and put in file folders with the Q & A number marked on the file.

Witness statements, notes, and "can say" statements, were also listed on the Q & A computer master index and assigned a Q & A number. The entire content of the document would not be on the Q & A program but only a description. Statements were photocopied and put in file folders with the appropriate Q & A numbers.

The materials that were not entered into the Q & A database were kept at the Truro subdivision office of the RCMP. These made up 63 banker boxes of material. The content of the boxes were known by the descriptor given in the RCMP total exhibit list.¹⁹⁸ The total exhibit list and statements were also provided on Word Perfect disk.

A complete chronology or time line of disclosure issues will be set out later. For now, it is only necessary to refer to these briefly. On November 12, 1993, Gordon Kelly, of Blois, Nickerson &

¹⁹⁸ It was later learned during the trial that the RCMP had set up what they referred to as 'administrative files' that were broken down into 444 sub-files. These were not considered relevant by the RCMP. As far as we are able to determine, the prosecution team was unaware of the existence, let alone content, of these files. The significance of these 444 administrative files is set out later.

Bryson, formally requested disclosure from the first prosecution team:

We hereby request on behalf of Mr. Phillips, full and complete disclosure by the Crown in accordance with the principles laid down by the Supreme Court of Canada in Stinchcombe v. The Queen and the Policy Directive on disclosure issued by the Attorney General of the Province of Nova Scotia.

We would ask that the Crown provide full and complete disclosure within ten (10) days of the date of this letter.

The Crown made arrangements for Kent Clarke, also of Blois, Nickerson & Bryson, to attend at the Truro Subdivision Detachment on November 22, 1993, to hand over the material and provide an explanation about the materials being provided. When it appeared that the Crown would take the view that a preliminary inquiry should proceed as scheduled on March 28, 1994, Mr. Kelly wrote to Mr. Felderhof on December 10, 1993, and stressed that the defence needed to have full and complete disclosure. Mr. Felderhof wrote to Mr. Kelly on December 13, 1993, indicating that Mr. Kelly did, in fact, have full and complete disclosure from the Crown, but as the RCMP investigation was continuing, further material would no doubt be forthcoming. He confirmed the materials that had been provided to Mr. Clarke on November 23, 1993, of the Q & A disk, the complete exhibit list, and hard copies of all statements and documents that had been provided to the Crown by the RCMP. In addition, he confirmed the existence of other materials in the possession of the RCMP:

As your office has been made aware, other materials were seized by the RCMP and not deemed relevant. These are available for your perusal upon request. They are in the possession of the RCMP, however, this office is prepared to assist you in making the necessary arrangements to peruse same should the occasion arise.

I would confirm that full and complete disclosure has been offered to your client as early as April 1993. This offer was repeated on the dates of each of his court appearances.

Disclosure of further materials that were being provided to the Crown, such as experts reports, photographs, and statements as they were taken, were passed on to counsel for Mr. Phillips and offered to Mr. Parry. In addition, the Crown provided to the defence a complete copy of the investigative file that had been prepared by the Department of Labour.

There is little doubt that the first prosecution team and the RCMP¹⁹⁹ were well aware of their responsibilities with respect to disclosure. In one of the first meetings held by the prosecution team on April 27, 1993, the Crown identified a concern that they ensure disclosure uniformity to all accused. S/Sgt. MacDonald assured the Crown that the computer system (Q & A) that the RCMP had used for the investigation virtually assured uniform disclosure. The importance of disclosure was revisited in a team meeting on February 4, 1994. The team agreed that they would bend over backwards to accommodate the accused with respect to disclosure.

The team's expectation that the preliminary inquiry scheduled for March 28, 1994, would be adjourned was reinforced by the notice given by Joel E. Pink, Q.C., acting on behalf of Mr. Parry, on February 8, 1994, that an application to adjourn the preliminary inquiry would be brought on behalf of Mr. Parry on March 2, 1994.

The application brought on March 2, 1994, was not successful, but it was left open to Mr. Pink to renew the application on March 28, 1994. In the meantime, Mr. Pink had scheduled an application in the Nova Scotia Supreme Court to compel the Government of Nova Scotia to appoint counsel for Mr. Parry. A date to hear that application was set for April 28, 1994.

On March 28, 1994, Mr. Pink advised Judge Curran that Nova Scotia Legal Aid had made an offer to Mr. Parry to provide counsel for him. The offer was contingent on Mr. Parry making a partial contribution of his assets toward the legal costs. At this time, Judge Curran adjourned the

¹⁹⁹ Chris Morris had written to S/Sgt. MacDonald on February 24, 1993, and had set out the obligation of the Crown and the role of the police. Mr. Morris forwarded to S/Sgt. MacDonald papers written by RCMP counsel and counsel from the Department of Justice about the current state of the law with respect to disclosure, including the principles set out in *Stinchcombe v. The Queen*.

preliminary inquiry. A return date of May 10, 1994, was set. It was hoped that by that time Mr. Parry would have counsel and that a firm date could then be set for the preliminary inquiry, probably some time in the fall of 1994. The first prosecution team and counsel for Mr. Phillips agreed with the adjournment, although counsel for Mr. Phillips stressed that his client wanted to proceed as soon as possible.

Mr. Pink's application before the Nova Scotia Supreme Court, on behalf of Mr. Parry, that had been scheduled for April 28, 1994, was adjourned until May 4, 1994. It was adjourned in order to add Nova Scotia Legal Aid as a defendant to the application for the appointment of state-funded counsel for Mr. Parry as Mr. Parry had refused the offer from Nova Scotia Legal Aid. The hearing on May 4, 1994, of this application was not completed. The parties were ordered by Justice Merlin Nunn of the Nova Scotia Supreme Court to return on May 31, 1994, to see if they could resolve the issue by that date.

Preferment of the Direct Indictment

The Crown has the power to prefer an Indictment following a preliminary inquiry against any person who has been ordered to stand trial for any offence for which that person has been ordered to stand trial, or for any offence founded on the facts disclosed by the evidence at the preliminary inquiry.

In addition, the Crown has the power to prefer a direct Indictment. That is, where a preliminary inquiry has not been held or an accused is discharged after a preliminary inquiry, the Crown may still proceed to trial by preferring a direct Indictment, but this power requires the personal consent in writing of the Attorney General or the Deputy Attorney General.¹⁹⁹

Given the difficulties in proceeding with the preliminary inquiry, the first prosecution team, in early May 1994, first considered that the preferment of a direct Indictment should be examined. When

¹⁹⁹ S. 577 of the *Criminal Code*.

the Crown was notified by counsel for Mr. Phillips that his client intended to waive the preliminary inquiry and re-elect for trial by judge without a jury, the procedural dilemmas and delay facing the prosecution brought this issue to a head.¹⁶¹ A meeting was scheduled with the then Director of Public Prosecutions, John Pearson, the prosecution team, Martin E. Herschorn, Q.C., Marc Chisholm, and S/Sgt. MacDonald for May 16, 1994.¹⁶² As noted in an earlier section of this report, Mr. Pearson, before consenting to a preferral of a direct Indictment, had to be satisfied that there was a reasonable likelihood of conviction.¹⁶³ The opinion provided to Mr. Pearson at that time from Mr. Felderhof was that there was an 80% likelihood of conviction. Mr. Rosinski was of the view that there was a very good chance of conviction; S/Sgt. MacDonald was of the view that he had become four-fold satisfied that the evidence was there upon which to convict. Arthur Theuerkauf had provided an executive summary of the evidence and, in his opinion, there was clearly enough evidence for the accused to be convicted. The minutes of that meeting indicate a discussion of the important issues of whether it was in the public interest to prefer a direct Indictment. It was further recognized that disclosure should be as substantially complete as possible in order to avoid any prospect of prejudice to the accused because of late disclosure.

Based on the strength of the case, the desire by Mr. Phillips to waive a preliminary inquiry, and the uncertainty of the length of the delays due to Mr. Parry's seeming inability to obtain counsel from Legal Aid, Mr. Pearson indicated he was prepared to sign or authorize the signing of a direct Indictment.

A direct Indictment was preferred on May 18, 1994. The date of first appearance in Supreme Court was arranged for June 16, 1994.

¹⁶¹ Formal notification of the intended waiver of the preliminary inquiry and notice of re-election was filed on May 10, 1994.

¹⁶² Andrew Macdonald was not present at the meeting as his contract for employment ceased on May 12, 1994.

¹⁶³ By virtue of the *Public Prosecutions Act*, S.N.S. 1990 c.21, the DPP is given the status of a Deputy Minister and is specifically designated to be the Attorney General's lawful Deputy for the purposes of the *Criminal Code* (s. 4)(c).

June 16, 1994 - February 6, 1995

The first appearance for the direct Indictment was in Pictou before the Honourable Justice David MacAdam. Notices of re-election were tendered by both counsel for Mr. Phillips in the morning, and counsel for Mr. Parry in the afternoon, for trial by judge alone. Anne Malick, Q.C. of Nova Scotia Legal Aid, along with two staff lawyers, had just received the assignment to represent Mr. Parry. It was the Crown's suggestion it would take counsel many months to come to grips with the material and that the trial would take 6-8 months.

A trial date of February 6, 1995, was set with it being open for counsel for Mr. Parry to return to court should they not have sufficient time to prepare for trial.

Given the anticipated length of the trial and its complexity, it was determined that a trial judge should be assigned as soon as possible to have a pretrial conference.

On June 22, 1994, Mr. Clarke of the defence team representing Mr. Phillips, wrote to the Crown seeking a copy of the computer disks containing the statements of witnesses who had been interviewed. The Phillips team also announced that they would, at a future date, request to attend at the RCMP offices in Truro for examination of the remaining exhibits which had not been copied due to a determination that the material was not relevant.

The disks were forwarded to both sets of defence counsel by courier on June 29, 1994. On June 27, 1994, Mr. Felderhof wrote to Mr. Clarke that the remaining boxes of exhibits that were considered irrelevant by the Crown, would be made available to him by the RCMP at his request.

A pretrial conference was scheduled for July 5, 1994, at the Court house in Truro. Apparently no trial judge had yet been assigned. The meeting in Truro was therefore not a pretrial conference but a meeting between Crown, defence, and a Justice of the Nova Scotia Supreme Court to determine

whether a case management approach would be appropriate to expedite and facilitate the trial. Following that meeting, the Crown took the position that discussion of such issues should take place before the trial judge. It was their view that it would be in the public interest that the conferences be recorded.

In a letter dated July 26, 1994, Ms. Malick wrote to Mr. Felderhof to explain in detail why a cooperative case management approach to the trial of these charges was in order. She argued this was not the usual case where the Crown simply gives everything it has to the defence and thereby fulfils its obligations under the disclosure provisions. She argued that the sheer volume of evidence, an excess of 200 witnesses, the enormous number of exhibits that those witnesses might refer to in their testimony, the prospect of upwards of 30 experts in a trial lasting 6-8 months, called for a fluid and comprehensive approach to disclosure.

She went on to explain that her suggestion about obtaining the Crown's "blueprint" of the case was simply a request that they have a list of Crown witnesses and the exhibits to which those witnesses would be referred to and the order in which they may be called. If this would not be forthcoming, then she would have no alternative but to seek an immediate pretrial conference and, if necessary, an adjournment of the trial. Her comments to Justice MacAdam on July 5, 1994, were not a complaint that the Crown had not given disclosure up to that point, nor that they would fail in their continuing obligation to disclose. Furthermore, the request was not to try to take away the Crown's ability to amend, or to add to its case, but only to enable the defence to properly prepare for the trial.

Mr. Felderhof replied in a terse letter of July 29, 1994, that they did not have a meeting of the minds on various issues, including disclosure. He would reply to her concerns on his return from vacation, August 15, 1994. Ms. Malick followed up with a further letter of August 9, 1994, asking detailed questions about the information that she wished from the Crown regarding the timing of getting a list of Crown witnesses, their order, the exhibits to which they will be referred to, including

experts.

Mr. Felderhof replied by letter dated August 17, 1994, that with respect to the witnesses who will be called at trial, the defence has a list of all potential witnesses known to the Crown. That list of witnesses, hard copies of their statements, can-says, and interviews are contained in the Q & A computer program as well as the Word Perfect disks.

In relation to exhibits, he advised Ms. Malick that the Q & A program allowed a search of the name of witnesses to see which exhibits they have had contact with thus answering the question as to which exhibits each witness may refer to. It was his position that the order of witnesses is not part of disclosure.

Justice Anderson was appointed as the trial judge. The first pretrial conference was held on September 2, 1994. Further pretrial conferences were held September 13, 27, October 18, 1994, November 15, 1994, December 2, 1994, December 23, 1994, January 31, 1995, and February 1, 1995.

It is not necessary to detail all of the various issues that were discussed throughout the pretrial conferences. The Crown agreed to provide a list of witnesses and eventually provided a list of exhibits that they intended to have each witness refer to. In addition, there were a variety of letters written by counsel on behalf of Mr. Parry seeking further notes, statements, maps, and clarification of documentation. Between early September and the end of December 1994, the defence team on behalf of Mr. Parry had written seven letters to the Crown regarding disclosure issues. The defence team representing Mr. Phillips had written one letter and that dealt with exchanging a defective computer disk for a new one.¹⁶⁴ The Crown had written to the defence some 23 letters dealing with disclosure in that same time period.

¹⁶⁴ Letter of December 7, 1994.

Commencing January 18, 1995, the defence team on behalf of Mr. Phillips commenced writing letters requesting disclosure and/or access to certain information or documentation. On many occasions there were multiple letters bearing the same date to and from the Crown. It is only necessary to refer to a few.

On January 18, 1995, Mr. Clarke wrote to the Crown expressing concern that there was a large volume of relevant material in the Crown's possession which had not been disclosed to the defence. They confirmed that on January 19, 1995, they intended to meet with S/Sgt. MacDonald in Truro to review the 63 boxes of material that had not been considered relevant and hence not disclosed.¹⁶⁵

The letter went on to state:

Particularly, we are concerned that the Crown has still not disclosed material compiled by the Department of Labour concerning the mine on the May 9th explosion. We take the position that the Crown is singular and as part of the Crown's obligation to disclose, any information in the Department's possession must also be disclosed.

Today, we had the opportunity speak with Don Mitchell, who is a well-known consultant and was formally retained by the Department of Labour to prepare certain reports with regard to the explosion and summary offence charges under the Occupational Health & Safety Act... To date we have not found, as part of the Crown's disclosure, any such reports. We expect to receive immediate disclosure of Mr. Mitchell's report and any and all reports, files, and other material in possession of the Department of Labour, or other Crown department, which are relevant to this case.

(emphasis added)

In letters dated January 24 and 26, 1995, the defence team representing Mr. Phillips requested immediate access to the Westray mine site with S/Sgt. MacDonald in attendance to seize further materials, access to the methanometers that had been tested by CANMET, notes of investigators regarding any witnesses for which statements had not been taken and copies of files from their

¹⁶⁵ A complete list of the materials had been disclosed in November 1993, access was offered then and repeated in June 1994.

examination of the materials in Truro (a list that ran to seven and a half pages).

In a lengthy letter dated January 30, 1995, Mr. Theuerkauf responded to the various requests. He wrote that the Crown, as represented by the Public Prosecution Service, did not agree with the position that the Crown was singular and that whatever the Department of Labour was in possession of, was to be attributed to be in the possession of the Public Prosecution Service thereby triggering a disclosure obligation with respect to such material. He indicated that the PPS is an independent body and does not have access to the Department of Labour files. The material received by the Public Prosecution Service was the investigative file by the Department of Labour investigators which had earlier been disclosed. Mr. Theuerkauf set out the actions taken by the Prosecution team to assist the defence in getting access to such materials. They immediately called Ms. Tyson at the Department of Justice and indicated they had absolutely no objection to the defence having access to any Department of Labour or other provincial government department.

The letter went on to indicate that the Crown would obtain the notes that had been requested. Mr. Theuerkauf noted that for the copies of materials that had been requested, some had already been provided; for the balance, they would be provided as soon as possible. Even though the Crown, as represented by the Public Prosecution Service, had no control over the Westray mine site, they had no objection to the defence having access and would assist in any way that they could. Although S/Sgt. MacDonald was originally willing to attend the mine site with the defence team, he later changed his position. This led to an application by the defence for an Order from Justice Anderson to attend the mine site in the company of the Sheriff to take control of items considered relevant by the defence team for Mr. Phillips.

Two pretrial motions were scheduled to be argued before Justice Anderson on January 31, 1995. The defence team for Mr. Parry brought a motion for the court to declare s. 70(1) of the *Coal Mines Regulation Act* to be unconstitutional and that it could not be the predicate offence for the

allegation of unlawful act of manslaughter.¹⁶⁶

The other pretrial motion was brought by the defence team for Mr. Phillips. It sought an order of the court to exclude from evidence alleged acts said to have occurred over the period of September 1991, to the day of the explosion, May 9, 1992. The basis of the application was that to admit that kind of evidence would be to violate the rule against the Crown calling "bad character evidence" which would be unfairly prejudicial to Mr. Phillips.

In a criminal trial, all evidence that tends to show that an accused is guilty is prejudicial. After all, it tends to put the accused in the worst possible light - i.e. that he or she is guilty of a criminal offence. However, it is a fundamental principle that the Crown is not permitted to lead evidence that simply portrays an accused as a bad person. Such evidence is unfairly prejudicial. Evidence of prior misconduct unconnected with the allegations have little or no probative value, yet stains the accused in a prejudicial fashion. Exceptions to this rule include situations where the accused places his or her character in issue by claiming that they are persons of good character or not the type to have committed the offence alleged. In addition, the Crown may be permitted to call evidence of other allegations of criminal or discreditable conduct only where the probative value of the proposed evidence outweighs its prejudicial effect.

The Crown's argument was simply that allegations of alleged other incidents over the course of nine months in the operation of the mine, tended to establish a course of conduct which would make the evidence admissible. Such evidence would also be relevant to the *mens rea* of the offences of criminal negligence and manslaughter and tend to rebut a defence of accident.

A decision on these two motions was adjourned until February 1, 1995. At that time, Justice Anderson dismissed the constitutionality arguments as being premature and that a decision would be made after the calling of evidence was complete. On the motion by the defence team for Mr.

¹⁶⁶ This was a similar argument that had been brought before Curran Prov. Ct. J. but dismissed by him due to his lack of jurisdiction to consider the constitutional issue, no election having been made to make him the trial judge.

Phillips to exclude evidence that they classed as 'bad character' or 'similar fact' evidence, the motion was denied. There would be no blanket order for exclusion of evidence.

Cardinal River Coal Materials

In 1993, the first prosecution team had asked S/Sgt. Ches MacDonald what background information was available with respect to the accused. On June 16, 1993, S/Sgt. MacDonald wrote to the Occupational Health & Safety Branch of the Alberta Department of Labour and requested information with respect to the mining certification which Messrs. Phillips and Parry had held in Alberta, the applicable coal mining regulations in place, and any details with respect to their employment and supervision by the Alberta Occupational Health & Safety Inspectorate.

In the summer of 1993, materials were sent to S/Sgt. MacDonald by the Alberta Department of Labour. Most of this material was from a time when Mr. Phillips was the mine manager for a company called Cardinal River Coal Limited. Hence, the materials were usually referred to as the Cardinal River Coal files or materials.

The Crown reviewed this material and decided it had marginal relevance and would not be admissible. Because of the application by the defence team for Mr. Phillips about 'bad character' and 'similar fact' evidence, the Crown decided that, even though they had no intention of using this material, to have S/Sgt. MacDonald assign Q & A numbers to it and provide copies to the defence. The defence were notified of the existence of the materials in Mr. Theuerkauf's letter of January 30, 1995. Copies of the Cardinal River Coal materials were provided on February 1, 1995.

The defence team for Mr. Phillips held this up as an example of how the Crown was assuring them they had full and complete disclosure, yet were just then disclosing materials that they had had in their possession since July 1993. The defence team for Mr. Parry complained of this late disclosure in terms of having to deal with an examination of such material just as they were trying

to get ready for trial. In addition, they complained of the late disclosure of a so-called 'Consent Agreement'.¹⁶⁷ The Crown acknowledged that they could not see the possibility of even being able to cross-examine Mr. Phillips on any of that material unless he put his character in issue - that is, claimed he was a person of previous good character. The Crown acknowledged that it was a judgment error on their part to have not included this material in the Q & A disclosure materials because they thought it was not relevant.

Justice Anderson requested written briefs and argument was scheduled for February 10, 1995.

In the submissions made before Justice Anderson, there was no examination of the content of the so-called Cardinal River files. The Crown took the position that the defence was in no way prejudiced by the late disclosure of this material since it could only be used in the event that Mr. Phillips took the stand and raised certain issues. The defence asked for an Order of Exclusion and for Costs.

Justice Anderson held as follows:

Now the defence acknowledges, and I agree, that the breaches in disclosure were not intended to mislead, considering the amount of documentation and the number of exhibits, but there was not due diligence.

There is also this new system of computerizing exhibits and documents. With reference to the files, porta-files as they are called, I would again refer to the

¹⁶⁷ On November 17, 1993, Judge McLellan had dismissed the Crown's appeal in relation to the non-compliance with the requirements of s. 490 of the *Criminal Code*. The decision upheld the order of Judge MacDonald that the items be returned to Curragh Inc. At this time, Curragh Inc. was in receivership. It was important to the Crown's case to maintain control over these important exhibits. To return them to Curragh Inc. could create the possibility that they would be lost forever for independent testing by the accused, Gerald Phillips and Roger Parry. The realistic options considered were to return the items to Curragh Inc. and immediately re seize them pursuant to a new Search Warrant, or contact the Receiver, and obtain an agreement for the RCMP to keep the exhibits. It was the latter course that they choose to pursue. The Receiver had no interest in getting back the exhibits that had been seized from the Westray mine site and entered into a Consent Agreement for the RCMP to keep the exhibits. This Consent Agreement was signed December 14, 1993. It was not included in the Crown disclosure materials until December 1994 when a representative of the Receiver was added as a witness and a copy of the Consent Agreement was identified as an exhibit to be introduced.

overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence which is a principle of fundamental justice, and I would find as a breach of section 7, and therefore, section 24(1) kicks in, and those 14 files as excluded from use by the Crown in this trial.

I am also ruling that any further evidence gleaned by the Crown is not to be used.

We have examined the so-called Cardinal River files. In our opinion, for the most part, they are completely irrelevant. Some of them are no more than correspondence files between Mr. Phillips and the Occupational Health & Safety division of the Alberta Department of Labour with respect to proposed regulations on mine safety. Others deal with such issues as to the granting of permission to shut down a mine that was no longer active. There are only three files that have even marginal relevance to the allegations arising out of the operation of the Westray mine. Two files contain documentation about reminders of safety issues, such as the importance of dust sampling, sampling plans, testing and combustibility levels. Another file deals with the importance of having a water gauge. All of this material was from the early 1980's.

Unbeknownst to the Crown, they had in fact disclosed this information.¹⁶⁷ In July 1996, Mr. Theuerkauf was reviewing information contained on the Westray Word Perfect disks that had been sent to each defendant on October 20, 1994. The index on disk number 4 is reproduced at Tab 29. Among the files listed is "phillips.bgd." When opened, this file is "Gerald Phillips - Background in Alberta Coal Mines." There is then a point summary prepared by S/Sgt. MacDonald of the contents of all the documentation obtained from Alberta in 1993. The actual print-out from the disk provided to the defence on October 20, 1994, is attached as Tab 30. We have compared this summary with the hard copies in the Q & A files. In our opinion, it is an accurate summary of the information contained in the files.

¹⁶⁷ The Crown can, and frequently does, fulfil its disclosure obligation without actually providing copies of documentation to the defence. If the defence requests copies of documents, they would be entitled to receive them. See *R. v. Collier* (1992), 72 C.C.C. (3d) 570 (Ont. C.A.); *Leave to Appeal refused* 91 C.C.C. (3d) vi.

The incident surrounding the alleged late disclosure of the Cardinal River coal materials is significant for a number of reasons. It demonstrated to the trial judge that the complaints about disclosure appeared to have merit. As it turned out, it also provides cogent evidence that the prosecution team did not have a good handle on the content of the materials. If they had, they would have been able to realize that this information had in fact been disclosed.

Overview of the Trial

The trial officially commenced before Justice Anderson on February 6, 1995. No evidence was called during that week. The days were taken up with the pre-marking of exhibits. During this process it was determined that the copies of disclosure that had been provided to the defence did not exactly match the exhibits being marked for court. Some of the discrepancies could be attributed to the poor quality of the photocopying, for instance, some materials on the back of documents had not been copied, and some information on yellow post-it notes had not been reproduced.

The calling of evidence commenced on February 13, 1995. On March 2, 1995, in the middle of the examination of only the 12th of approximately 200 witnesses expected to testify, Martin E. Herschorn, Q.C., the Deputy Director of Public Prosecutions, received a call from Justice Anderson. Justice Anderson requested Mr. Herschorn to take steps to remove Mr. Felderhof as lead Crown Attorney. He complained that, in his view, Mr. Felderhof was not adequately prepared for the conduct of the trial and that the judge was pressed every day to bite his tongue. If Mr. Herschorn did not remove Mr. Felderhof as lead Crown Attorney, then Justice Anderson would be taking steps to secure that end.

The defence were notified of the gist of this development on the following Tuesday, March 7, 1995. A recusal motion¹⁶⁹ was brought and dealt with March 9, 13, and 14, 1995. The defence team for Mr. Phillips opposed the application. The defence team representing Mr. Parry supported the

¹⁶⁹ In essence, a recusal motion is a request that a presiding judge disqualify him or herself from presiding over a trial, and to declare a mistrial if the trial has already commenced. A new date is then set for the parties to appear in court to obtain a new trial date.

Crown's application. Justice Anderson gave his tersely-worded decision on March 14, 1995:

I accept the submission for counsel for Mr. Phillips, and the authorities that I have considered lead me to conclude that I cannot grant the application of the Crown. The motion is dismissed.

(A.B. vol. 9, p. 2497)

Continuation of the trial was adjourned to April 10, 1995. The Crown filed an Application for Leave to Appeal to the Nova Scotia Court of Appeal, which was subsequently abandoned, and an Application for Leave to Appeal directly to the Supreme Court of Canada, which was denied.

The defence sought access to the Department of Labour files and further disclosure from the Crown of police notes. They also demanded full and complete disclosure of the whole of the RCMP file. This resulted in the disclosure of the 444 administrative files. A listing of them was provided. The defence sought access to these. Access was provided. On May 9, 1995, the trial judge granted an Order for particulars requiring the Crown to specify the equipment and materials alleged to have been used in an unsafe manner. On the same day, the defence for Mr. Phillips and Mr. Parry gave notice of their intention to bring an application for an Order staying the proceedings. On May 10, 1995, a further motion was brought for determination of the sufficiency of the particulars provided by the Crown. The trial judge held that the particulars were insufficient and ordered the Crown to provide better particulars.

Later that day, both the defence for Mr. Parry and for Mr. Phillips filed formal applications to stay the proceedings. The hearing with respect to these applications was scheduled to commence May 23, 1995.

Between May 10 and May 23, 1995, materials were identified as being in the possession of the Department of Labour that had never been reviewed by either the Crown or the defence.

The stay application commenced May 23, 1995, and continued over eight days. Affidavits were filed by the defence team for Mr. Phillips containing correspondence and related materials. The Crown filed two binders of correspondence and materials with respect to disclosure. Oral evidence was heard. The two substantive witnesses were Marion Tyson, Q.C., of the Nova Scotia Department of Justice, and S/Sgt. MacDonald. During the course of the hearing, various documents were made exhibits.

SECTION VIII: ALLEGATIONS OF MISCONDUCT

The allegations of misconduct made against the Crown centred on disclosure. In essence, the defence complained that there had been nondisclosure, late disclosure and unreliable disclosure. It was suggested that the Crown's failure to fulfill its obligation to disclose all relevant information had caused prejudice to the conduct of the defence, and that no remedy other than a judicial stay of proceedings could cure the prejudice suffered. As an adjunct to the complaint, the defence referred to the Crown's attitude of always insisting that they had made full and complete disclosure and its uncooperative approach, its seeming unwillingness or reluctance to provide basic information about its list of witnesses, and the order in which they would be called, and what exhibits would be shown to each witness.

It is not necessary to recite all of the issues that arose before and during the trial, and the submissions and rulings made. That the Crown did not adequately disclose the information in its possession appears indisputable. We believe it to be important to explain why, in our opinion, this happened and if any recommendations need to be made.

Intentional Non-Disclosure

We have examined all of the materials before Justice Anderson on the stay application, both *viva*

voce and documentary evidence, and all written and oral submissions made before Justice Anderson, the Nova Scotia Court of Appeal, and the Supreme Court of Canada. In addition, we have reviewed all the documents available with respect to the work of the first prosecution team lead by Mr. Felderhof.

*In our opinion, there is absolutely no evidence of any intentional non-disclosure. That is, that any member of the Public Prosecution Service or the RCMP in any way attempted to hide information that would embarrass the Crown's case or assist the defence.*¹⁷⁰

Furthermore, there was no allegation of intentional non-disclosure before Justice Anderson by the defence.¹⁷¹ This position was reaffirmed in the proceedings before the Nova Scotia Court of Appeal and the Supreme Court of Canada. The question was directly raised in the oral argument before the Nova Scotia Court of Appeal as to whether or not there was any direct evidence, or evidence from which one might infer, that the Crown was deliberately withholding material. The defence responded:

Well, the - - no, there - - from the [inaudible] of the evidence one - - we say one must question why so many documents were missing, why it was so badly handled. The answer to the question is we would have to have fairly strong evidence of that to attribute that to the Crown and we don't have it. But where we believe the fundamental problem lies is that there was a total misapprehension of what their obligation to disclose was and therefore because they didn't properly understand the disclosure obligation, they made improper disclosure.

*An example is - - and I would like to go through S/Sgt. MacDonald's evidence in some detail - - is what he determined what was relevant.*¹⁷²

¹⁷⁰ It could be argued that the decision by the first prosecution team not to put the Cardinal River Coal materials on Q & A was 'intentional non-disclosure' in the sense that a conscious decision was made not to do so. However, this was only an error in judgment, on the issue of relevancy. Furthermore, this kind of example is moot since, in our opinion, the Crown did, in fact, disclose to the defence the information regarding the Cardinal River Coal materials.

¹⁷¹ Appeal Book, vol. 22, p. 6309.

¹⁷² Transcript of proceedings, p. 290-91, N.S.C.A.

While maintaining that the Crown did not do their job, the defence acknowledged that there was no malice by the Crown.¹⁷³

Disclosure/Cooperation Problems

The following is a list of the more significant problems that the defence complained about before and during trial:

- The seeming reluctance by the Crown to provide information about the witness list, order of witnesses and exhibits.
- The disclosure on February 1, 1995, of the Cardinal River Coal materials.
- The use by the Crown of documents that were edited copies of the original.
- The leading of evidence on direct examination involving the shredding of documents immediately after the explosion on May 9, 1992, and the non-disclosure of the RCMP investigation into the shredding allegation.
- The delegation of the initial disclosure assessment to the RCMP.
- The failure by the Crown to secure all materials from government departments, in particular the Department of Labour, that were relevant to the issues in the criminal case.
- The failure of the Crown to adequately respond to the initial order for particulars and the subsequent failure of the Crown to provide the particulars as directed by the

¹⁷³Transcript of Oral Argument, Supreme Court of Canada, November 26, 1996, p. 34-5.

supplementary order of the trial judge with respect to the allegation of the unsafe use of equipment.

Discussion

In the examination of a prosecution effort as long and as complex as the Westray case, there can be a tendency to overgeneralize what went wrong. Nevertheless, we are confident in concluding that systemic underresourcing of the investigation¹⁷⁴ and prosecution is at the core for the charges having not ended up in a trial on their merits.

At the time that the investigation began it was considered to be one of the largest investigations undertaken by the RCMP anywhere in Canada. Although the software program was later demonstrated to be somewhat unreliable, it was considered, at the time of its selection, to be the best available. It would be unwarranted and unfair to criticize the RCMP for the selection of this program. Moreover, many of the problems that occurred with the Q & A software program occurred because of inconsistent data entry. Many different members of the RCMP carried out the task of data entry. This was the wrong approach, and should have been recognized at the time to be wrong. Either trained personnel should have been hired to do the work, or a core number of RCMP civilian employees or members should have been trained and utilized throughout the process.

In addition, although the RCMP had numerous members assisting in the investigation up to the time of the laying of the first information, this manpower got quickly pared down to essentially one person, S/Sgt. Ches MacDonald. The file was too complex and voluminous for that. In our opinion, the charges were laid prematurely. We have no doubt that the RCMP did, in fact, have ample reasonable and probable grounds to lay the charges on April 20, 1993, but the investigation was far from complete. It is certainly not unusual for investigators to be aware of the need to carry

¹⁷⁴ Although it could be said that an assessment of the investigation is beyond our mandate, the law with respect to disclosure mandates that for purposes of disclosure that the handling of materials by the police are attributed to the Crown (*R. v. MacPherson* (1991), 105 N.S.R. (2d) 123 (N.S.S.C.)).

out further investigative tasks after the laying of charges. However, the tasks left to be done after April 1993, turned out to be a formidable undertaking. File management and organization suffered as a result. Members of the first prosecution team spoke in laudatory ways of the dedication and energy demonstrated by S/Sgt. MacDonald. However, in our opinion, he was left without adequate time to ensure that relevant correspondence was properly filed, catalogued, and disclosed.¹⁷⁵

The Crown was plagued throughout the trial on the issue of which documents were originals and which were copies. The RCMP had seized copies of the same documents from several locations. Because there were notations on some of the copies, they could each be considered an original. The police selected one of the "copies" to be entered on Q & A for use by the Crown and defence. The selection was not always appropriate. The most glaring example was the entry into evidence of an edited safety walk report. This report came from a Department of Labour document that had been edited for purposes under the *Freedom of Information Act*. It was edited in a fashion that could lead an inference to be drawn that the employees who should have participated in that safety procedure, had not. In fact, when the original was located, it was clear that the miners had, in fact, participated.

In our opinion, the prosecution effort of the Public Prosecution Service was also underresourced, and this was a major factor in the difficulties encountered before both and during the trial before Justice Anderson. The original recommendation by Chris Morris was to have a senior litigator from private practice with big case experience assume the lead, and to have a team of four Crown Attorneys plus support staff, including a librarian.¹⁷⁶ Many of the issues identified by Mr. Morris

¹⁷⁵ A partial list of this correspondence not disclosed is: (a) a letter dated August 10, 1992, to S/Sgt. Ches MacDonald from Kenneth Richmond; (b) a letter [sometimes designated Report #3] dated August 17, 1992, to S/Sgt. Ches MacDonald from Kenneth Richmond; (c) the so-called General Monitor's material regarding some of the testing done at the request of Gerald Phillips while still Vice-President of Curragh Resources Inc.; (d) letter dated July 28, 1992, to Claude White from S/Sgt. Ches MacDonald re: sample and procedure on coal dust; (e) correspondence dated July 29, 1992, from the Westray Inquiry; (f) memorandum dated August 6, 1992, from Pat Hannan of the Department of Labour to Commission Inquiry Expert, Smalls, dated August 6, 1992, copy to S/Sgt. Ches MacDonald; (g) memorandum from Stewart Sampson of the Department of Labour dated June 4, 1992, to S/Sgt. Ches MacDonald.

¹⁷⁶ Memo, February 22, 1993.

and Ms. Clearly in their Memoranda of January 20 and 28, 1993, about legal and evidentiary issues were never addressed or resolved. Mr. Pearson's pointed letter to the Attorney General on February 26, 1993, stated that the PPS needed a team assembled immediately made up of four Crown Attorneys, one of whom to be an experienced commercial crime file manager, support staff, and a paralegal or librarian to manage the documents, as well as the usual support staff and equipment.

The fact that woefully inadequate resources had been allotted to the prosecutors responsible for the file from September 1992 to March 1993, created difficulties for PPS management to recruit Crown Attorneys willing to take on this huge responsibility. While Messrs. Felderhof, Rosinski, and Theuerkauf deserve recognition for even accepting to take on this task, they would be the first to recognize that their previous training and experience did not give them the necessary organizational and professional skills for the handling of the file. As a compromise, as previously noted, two offices were established, but this created problems in communication and hampered an overall cohesive prosecution effort.

Nevertheless, we were impressed by the determination of the first prosecution team to hold regular meetings with an agenda, with detailed minutes prepared following each, and their efforts to maintain communications amongst the team members and S/Sgt. MacDonald.

The first prosecution team made the decision to rely on the RCMP's initial determination of relevance. Given the resources at hand by the first prosecution team, it was a reasonable and necessary reliance.¹⁷⁷ However, in our opinion, the Crown was not adequately prepared to conduct the trial. A major reason for this was the lack of proper resources. There was no adequate filing system. There was no adequate system kept to demonstrate the content of disclosure that had been made to the defence. A partial list of the symptoms and/or examples is as follows:

¹⁷⁷ The first prosecution team did have Mr. Rosinski go through the 63 boxes of exhibits that had been seized by the RCMP but not put on the Q & A. This review alone took months. It ended up with additional material being catalogued on the Q & A system.

- The Crown had not done a detailed breakdown of the elements of the offence and the evidence that they had available to prove those elements. There was no outline of a summation or closing argument prepared as to what it was the Crown intended to submit at the end of the case. In our opinion, it is a fundamental principle of trial preparation and particularly for a case of this nature that these tasks be undertaken. When these steps are taken, any advocate will know well in advance of trial the case that he or she has to present.
- The defence request for a list of witnesses, their anticipated order, and the exhibits to be tendered, was a reasonable request. The refusal of the Crown to provide this information in August 1992 was simply, in our opinion, the product of the Crown not having that information. As late as October 1994, the Crown was still working toward developing a theory of their case.¹⁷⁷
- In anticipation of the trial, the Crown tendered a general notice under section 30 of the *Canada Evidence Act* that it intended to introduce copies of everything that had been provided to the defence as "business records." Requests were made for particularization of which documents the Crown was claiming fell under this category.

It appears that the Crown simply did not have enough time to be able to cross-reference the documents that they intended to produce to determine whether or not they needed to rely on the provisions of the *Canada Evidence Act* in order to introduce them, or whether or not they would have to have the author or another person in court to satisfy admissibility requirements. If they had had the time to carry out this task, many of the difficulties with the documents would have been

¹⁷⁷ This is not to suggest that the Crown did not have an understanding of what the case was all about. An opening address had been prepared but the Crown was not permitted by Justice Anderson to deliver it in open court. However, there is a vast difference between a general understanding of the case and the understanding of the legal and evidentiary issues that come from preparation of a summation.

discovered and avoided.

- With more of a commitment to a proper cataloguing and data management, the Crown would have been able to demonstrate that they had already disclosed the Cardinal River Coal materials. The admission by the Crown that they had not disclosed this material lead to a finding of non-disclosure, an alleged breach of the accused's *Charter* rights, and an order of \$500 costs against the Crown. It set the wrong tone for the start of the trial.
- With adequate resources, the Crown would have been able to ensure that the RCMP, to the best of their ability, had in fact disclosed all relevant materials and had employed the correct test in making the disclosure assessment.

For example, S/Sgt. MacDonald testified during the stay application that one of the rules he had used in deciding whether or not information was relevant, was whether or not it was hearsay.¹⁷⁹ He further indicated his belief that disclosure was with respect to "evidence" and not necessarily information.¹⁸⁰

- With more resources, the Crown would have had the necessary manpower to resolve some of the disclosure issues. One of the allegations of late disclosure was the discovery of a letter dated August 17, 1992, which Mr. Richmond had labeled "Report #3." The Crown had forwarded to the defence on July 7, 1994, additional materials with respect to Crown experts. The letter said that the file with respect to Kenneth Richmond (Q & A #02-66) should contain a list of items. In that list was the recitation of Reports #1, 2, and 4. No reference was made to Report #3.

¹⁷⁹ Appeal Book, vol. 21, p. 6117-8.

¹⁸⁰ Appeal Book, vol. 20, p. 5871.

Just prior to that letter, Mr. Theuerkauf had sent a fax to S/Sgt. MacDonald on July 4, 1994, raising the issue as to whether or not there is anything numbered Report #3. There is no record of a response or how the issue was resolved.

- At one point during the trial, Mr. Rosinski questioned a Crown witness in direct examination about issues surrounding the shredding of documents. The witness had given a statement to the RCMP in May 1992. This statement had not been disclosed since it had not been considered relevant. The RCMP, at the conclusion of their investigation with respect to shredding in May of 1992, had found no evidence of any wrongdoing. The shredding file had never been considered relevant, and hence had not been disclosed. This begs the question that if suggestions of shredding were not relevant, why was the Crown leading evidence, in direct examination, about it.

With a detailed summation in hand, with all of the first prosecution team familiar with the submissions that the Crown wanted to make at the end of the trial and the evidence that they needed to have before the court in order to make those submissions, this incident would not have occurred. It provided yet another example for the defence that there was "non-disclosure."¹⁸¹

- On May 4, 1995, the defence wanted to know whether or not it was part of the Crown's case that equipment was used underground which was not approved. The court asked the Crown to explain what equipment the Crown alleged was unapproved. It was pointed out to Justice Anderson that the Crown's allegation did not involve whether the equipment was approved or not approved, but rather whether or not it was used in an unsafe manner.

¹⁸¹ In fact there was nothing significant in the statement that was disclosed, but it was an example of a further instance of "non-disclosure."

The written application for particulars required the Crown to provide "full particulars" of the equipment and materials alleged to have been used in an unsafe manner, and full particulars of what equipment and materials that were said to have been used at the mine and were not approved. The Crown took the position that they were prepared to provide a list by way of particulars of what equipment and materials the Crown was alleging were used unsafely at the mine, but that with respect to approvals, it was a matter of evidence and not properly the subject of particulars.

On May 9, 1995, the Crown provided a response to the Demand for Particulars by providing the list of the equipment alleged to have been used in an unsafe manner. The defence was not satisfied. Justice Anderson agreed that the particulars were not sufficiently specific and ordered the Crown to prepare a proper response.

While it can be said that the Crown was in technical compliance with the request for particulars, the Crown knew, or ought to have known, that the response was not within the spirit of what the defence were asking and what the court had ordered them to provide. If the Crown had had a summation, they would have been able to provide the information required. Not all members of the team agreed with the response that was provided to the defence and to the court.

Impact on Trial Outcome

Although we have identified the systemic under-resourcing of the investigation and prosecution effort as the major contributor to the failure of the trial proceeding to a conclusion on its merits, we emphasize that this was not the only problem. Nor should it be taken as a conclusion that the failure of the Crown to disclose relevant information was fatal to the trial proceeding to a conclusion on its merits.

We have earlier referred to the requirement for the Crown to disclose all relevant information that is in its possession. Information should not be withheld if there is a *reasonable possibility* that the withholding will impair the right of the accused to make full answer and defence. The defence is under an obligation to bring to the attention of the trial judge, any problems about disclosure. In resolving the dispute, the trial judge may not only require submissions, but the inspection of statements, documents, and even *viva voce* evidence.¹⁸²

The Supreme Court of Canada, in *R. v. Egger* (1993), 82 C.C.C. (3d) 193, elaborated on how to make the determination as to whether or not information is relevant. Sopinka J. wrote:

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed: Stinchcombe, supra, at p. 16. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing the defence or otherwise in making a decision which may affect the conduct of the defence, such as, for example, whether to call evidence.¹⁸³

In our opinion, it is a rare trial during which some additional information is disclosed which ought to have been disclosed but was not, whether it is documentation or information in the possession of the police or a witness. Counsel is faced with making a decision about the significance of the information. If it is relevant and material to the accused's right to make full answer and defence, they may seek an adjournment of the trial (or perhaps just a brief recess), have the judge declare a mistrial, or seek an order for exclusion if the Crown would otherwise wish to use or introduce the information into evidence. Costs may also be awarded. A judicial stay of proceedings may be granted as an appropriate and just remedy where it is not possible through other means to remedy the prejudice to the accused's right to make full answer and defence. A judicial stay of proceedings

¹⁸² *Stinchcombe*, supra, p. 12.

¹⁸³ p. 204. See also *R. v. Chaplin* (1995), 96 C.C.C. (3d) 225 (S.C.C.).

is to be utilized as a last resort and only in the clearest of cases.¹⁰³

There is no separate constitutional right to disclosure. The Crown has an obligation to disclose and the accused has a right to full disclosure to ensure a fair trial at which the accused can make full answer and defence. Failure by the Crown to disclose does not amount to a violation of a right under the *Charter*. In order to establish a violation of a *Charter* right, the trial judge is required to make a determination as to whether or not the information that was not disclosed was *material*. *Relevance and materiality are not synonymous*. The best example of this is where a document may not have been disclosed. It contains relevant information, but it may not be material as the information may already have been disclosed in some other fashion. It is, therefore, axiomatic that the trial judge must make an inquiry into not just whether the information is relevant, but also whether it is or is not material:

Where the accused seeks to establish that the non-disclosure by the Crown violates s. 7 of the Charter, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. It goes without saying that such determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the Charter in this respect.¹⁰⁴

In Justice Anderson's decision to stay the proceedings, he made several key findings. They were:

- That the Public Prosecution Service was, for the purposes of the disclosure obligation, in "possession" of all of the relevant material that may be located at the Westray Commission of Inquiry, Department of Labour, or other government department. The Public Prosecution Service could not avoid its responsibility by taking the narrow view of possession that was set out in the Policy Directive on

¹⁰³ *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.), p. 41.

¹⁰⁴ *R. v. O'Connor*, *supra*, p. 40.

Disclosure issued by the Attorney General for the Province of Nova Scotia dated February 15, 1994.¹⁸⁵

- The Crown seemed unaware of the evidence it had at hand or available to it to substantiate the charge.
- The defence had gone to great lengths to seek out documents and that there was a "particular attitude" on behalf of the Crown, evidenced by a memorandum dated April 13, 1995, written by Mr. Felderhof to Mr. Theuerkauf.
- That there was lack of disclosure or non-disclosure and late disclosure that amounted to an infringement of the accused's rights to make full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedoms* and that such a breach demanded a remedy under s. 24(1) of the *Charter*. To arrive at this conclusion, the trial judge referred to seven examples.

During the hearing of the stay application, the Crown attempted to demonstrate that some of the information contained in the documents relied upon by the defence as examples of non-disclosure were not material. That is, that the information contained in the documents was known to the accused through other means. Justice Anderson accepted the argument of the defence during the stay application that it was not his function to examine the documentation of things that had been disclosed to determine whether or not the non-disclosure was, in fact, material.

¹⁸⁵ The first Policy Directive on Disclosure was issued by the Honourable Thomas J. McInnes, Attorney General, on February 7, 1990. It was replaced by a Directive that was developed by the work of a committee made up of representatives of the Public Prosecution Service, the judiciary, and the defence bar. It included the statement of principle:

Where the defence requests access to material not in the possession of the investigator or Crown Attorney, but in the possession of another agency, government department, or other person, the defence should be advised that the request can be made directly to the relevant agency, government department, or other person.

Appeal Proceedings

As noted in an earlier section of this report, the Crown's appeal to the Nova Scotia Court of Appeal was successful. The Crown argued that the trial judge had demonstrated a reasonable apprehension of bias, if not actual bias, and that he had failed to make a proper inquiry to determine the relevance and materiality of the information that the accused had alleged was not disclosed, or not disclosed in a timely manner, and that he had, therefore, erred in concluding that the accused's rights to make full answer and defence were infringed or denied under the *Charter*.

The proceedings before the Nova Scotia Court of Appeal demonstrate an exhaustive examination by the parties and the court of the allegations of late and non-disclosure.¹⁸⁷ The hearing before the Court of Appeal lasted some 15 hours stretching over 3 days. The main argument on the appeal was that the stay of proceedings could not stand as the trial judge ought to have declared a mistrial due to reasonable apprehension of bias, if not actual bias. In addition, the Crown presented a detailed argument that focused on the lack of proper inquiry by the trial judge and that the so-called non-disclosure or late disclosure was not material. A detailed submission was presented in the Crown Factum and in the oral presentation that if a proper inquiry had been held, the alleged late or non-disclosure would not have been found to have been material. There is no need to go through each example. A few will suffice.

In Justice Anderson's decision to enter the stay, he wrote:

Some examples that I find of non-disclosure or late amounting in non-disclosure was the Richmond Report, Exhibit 1728, an expert report. It discloses a possible defence dealing with spontaneous combustion of coal dust, August the 10th, 1992. Both the RCMP and the Crown knew of its existence. This report specifically said that it may be a possible defence.¹⁸⁸

¹⁸⁷ The Crown's Factum was 163 pages. The Facta on behalf of the Respondents Parry and Phillips were 120 and 200 pages respectively.

¹⁸⁸ 146 N.S.R. (2d) 163, p. 178.

Because the Crown was effectively foreclosed from introducing evidence before Justice Anderson to demonstrate that the documents which the defence claimed to be examples of late and non-disclosure were not relevant or material, the materials available before the Court of Appeal (in the absence of an application to adduce fresh evidence), were limited to materials that formed part of the record before the trial judge. However, even based on those materials, it is evident that the letter of August 10, 1992, from Kenneth Richmond was not material.

The comment in the letter of August 10, 1992, that was relied on by the trial judge was:

Another matter I discussed with the Bureau of Mines is the spontaneous combustion of coal. Although I do not believe that spontaneous combustion was involved in the Westray explosion, there may be some who will resort to this defence.

Mr. Richmond's letter of August 10, 1992, does not in any way suggest that spontaneous combustion is, in his opinion, a viable defence. Furthermore, there was ample material already before the trial court that demonstrated that information about spontaneous combustion was far from new. This information that had already been disclosed to the accused, in particular the following:

- The RCMP Exhibit List referenced the Royal Commission Report on the Acadia Coal Company (RCMP Exhibit #21-33). The exhibit was seized from the Westray mine office. The report contains details of the history of the Foord seam and Allan Mine. The entry in the Exhibit List specifically refers to "spontaneous fires lead to explosions." This RCMP exhibit was tendered at trial as Exhibit 600.
- RCMP Exhibit #23-67 was referred to as being a "spontaneous combustion

formula."

- RCMP Exhibit #162 referred to correspondence between Gerald Phillips and John Shilabeer containing an article on the Bureau developing a spontaneous combustion formula.
- RCMP Exhibit #42-16 referred to photocopies of graphs and statistical plots of desorbed gas and spontaneous ignition results.
- RCMP Exhibit #204 was seized from the Commission of Inquiry. The exhibit was made up of documentation on the ambient temperature oxidation of coal in relation to the early detection of spontaneous heating, spontaneous combustion, a coal mining hazard, spontaneous combustion of coal mine fires, and interpretation and analysis of mine gasses, studies in the early detection of spontaneous combustion in a hydraulic coal mine. A letter from Associated Mining Consultants Limited to Paul Tucker about the cost of carrying out tests to determine susceptibility to spontaneous combustion of Pictou County coal.
- RCMP Exhibit #248 was seized from the Commission of Inquiry. It is referred to a report on ventilation/methane, spontaneous combustion and subsidence by Associated Mining Consultants Limited,.
- RCMP Exhibit #565 was seized from the Curragh offices in Toronto. This exhibit was a memorandum to Marvin Pelly from Gerald Phillips dated October 30, 1992, concerning methane and spontaneous combustion. It was already marked as an exhibit at trial (Exhibit #304). In it Mr. Phillips wrote:

Testing of the susceptibility of the coal to spontaneous heating was conducted on coal samples from Westray. The tests were done by Hazen Research Inc. who are experts in the field located in Colorado in the United States. In the Hazen technique, a fresh, crushed, and screened (10 -6 mesh dry basis) sample of coal was put in a Dewa flask which is fitted with a thermocouple and oxygen inlet/outlet tubes. The entire apparatus was placed inside an oven at 74 degrees C and preheated oxygen, saturated with water vapour, was passed through the coal. The temperature of the coal was measured over time and the temperature-time relationship was plotted. Hazen's tests measures the relative tendency to a coal to self-heat and ignite under this particular severe condition of the test. The test shows the likelihood of spontaneous heating relative to other coals of known characteristics under the same conditions. Test results show that the Foord seam has a low tendency of spontaneous combustion.

- Mr. Richmond forwarded a Report (#4) dated September 7, 1992. In it we wrote:

The Bureau of Mines has also done considerable work on the self-heating temperature (tendency for spontaneous combustion) of coal. Bituminous coal, the minimum self-heating temperature correlates with the oxygen content of the coal, on a dry, ash-free basis. For the Westray coal, the oxygen content (with the ultimate analysis) is about 6%. This gives a minimum self-heating temperature of about 100 degrees C, based on a wide variety of coals, with the correlation co-efficient of 0.943. At any temperature below 100 degrees C, self-heating is not expected to occur. This is comparable to that for Pittsburgh coal, which is not known to self-heat under ordinary mining conditions.

In addition to the letter of August 10, 1992, Mr. Richmond had also written a letter on August 17, 1992, which he referred to as "Report #3." On the stay hearing this was marked as Exhibit 1729. The trial judge referred to this exhibit and relied on it as follows:

Exhibit 1729, a report of August 17, 1992, deals with the manner in which the RCMP should conduct their investigation of dust samples and particularly the disruption of dust layers so that you would not be able to determine the

conditions after the explosion. This report came to light by the efforts of the Applicants.¹⁸⁹

As noted earlier, the defence had been provided with Reports #2 and #4. There had been no specific requests to determine if there was a Report #3. The Crown had wondered the same thing, but the issue had not been followed-up. In any event, the information contained in that report was, in our opinion, not at all material. The reference in Report #3 to dust sampling was:

To perform coal dust sampling, the following equipment would be required:

- sufficient rugged sampling bags, with labels*
- a dust scoop*
- a log book, to note locations in the mine of samples*
- a metre stick, to measure depth of dust layers*

The minimum requirement for samples would be along the no. 1 main and the no. 2 main, 10 samples each, all the way to the flooded section. It would be extremely desirable to collect samples in the SW panel, at least as far as two cross-cuts, B road and C1 road. At present, this could be done only under oxygen, but easy if recovery will have been accomplished. The problem with recovery, it will tend to drastically disturb the dust layers, so we will not know their condition just after the explosion.

First of all, Mr. Richmond had provided a later report dated May 16, 1993, that dealt with all possible objections as to the validity of sampling coal dust after an explosion. It referred to numerous studies which, in turn, pointed out the obvious, that disturbance of the coal dust by the explosion or afterwards can disrupt the dust layers and have an impact on the reliability of the results.

Furthermore, the dust sampling carried out by the RCMP did, in fact, follow the recommendations. The caution noted by Mr. Richmond in his letter of August 17, 1992 (Report #3), referred to the problem of collecting dust samples under recovery. By recovery, it is plain he meant by

¹⁸⁹ *R. v. Curragh Inc. et al*, supra, p. 178.

reestablishment of ventilation into the southwest so that the dust sampling could be done barefaced rather than under oxygen. When the RCMP reentered the mine in September 1992, it was done under oxygen.

In the trial judge's decision, he referred to a report from General Monitors:

There is General Monitors report which deals with the methanometer on the continuous miner. There is evidence that this monitor was adjusted by one of the miners with the knowledge of another and that the adjustment would alter the reading of the methane levels at the sensor head. The methane levels could be at explosive range. There is evidence of the continuous miner creating sparks. The report of General Monitor indicates that the effect of altering was not disclosed. It may have represented a complete defence for the applicants and certainly goes the right of the applicants to make full answer and defence.¹⁹⁰

It had been known to all parties that one of the miners had acknowledged adjusting the zero screw on the control module of the methanometer system of the continuous miner on May 8, 1992. On February 11, 1993, Gerald Phillips, then Vice-President of Curragh Resources Inc., wrote to General Monitors asking for further testing on the methane gas detector system having the same model number as the one that was in use in the mine at the time of the explosion. He asked General Monitors to make assumptions about the adjustment of what is called the span screw as well as the zero screw. General Monitors wrote back to Mr. Phillips on February 23, 1993, giving him the results of their testing.

The control module that had been in use in the mine on May 9, 1992, was seized by the RCMP. It was sent to the CANMET Laboratory in Ottawa and examined by George Lobay. He had produced two reports, both of which were disclosed to the defence in a timely fashion. It was his opinion that the control module was in operating condition and responded appropriately to a simulated methane signal. He went on to clarify that identical model numbers may have different

¹⁹⁰ *R. v. Curragh Inc. et al*, supra, p. 178.

control module calibrations. Due to the fact that the whole system that was on the continuous miner on May 9, 1992, was not seized, he could draw no conclusions about how it may have actually been performing on May 9, 1992.

The evidence before the trial judge was that the results of the General Monitors testing was sent to Mr. Phillips. The defence team for Mr. Phillips raised this issue as one of non-disclosure. The defence team for Mr. Parry made no specific complaint about the late or non-disclosure of the General Monitor's material.

In our opinion, the Crown was correct in the analysis presented before the Nova Scotia Court of Appeal that the information said to have been disclosed late was not material and that the trial judge clearly misapprehended the evidence in concluding that the affect of altering would permit the continuous miner to operate in an explosive atmosphere or would have represented a complete defence for the accused.¹⁹¹

The trial judge referred to one example of late disclosure in support of his finding that the non-disclosure and timing of disclosure amounted to an infringement of the accused's rights under s. 7 of the *Charter* to make full answer and defence. It was a Consent Agreement of the Receiver Peat Marwick dated December 16, 1993. It was not disclosed until December 1994, when the Crown added the Receiver from Peat Marwick to its witness list.

On March 23, 1993, Judge Clyde MacDonald, subject to a Crown appeal, ordered the return of items seized pursuant to Search Warrants that had been executed by the RCMP at the Westray mine. The items that had been seized included bags of coal dust and other physical exhibits.

The Crown initiated an appeal to the Nova Scotia Supreme Court. That appeal was heard before Justice Douglas McLellan. He released his decision November 12, 1993, confirming that the items

¹⁹¹ The RCMP and the Crown believed that all of the General Monitor's materials had in fact been disclosed. See reformatted court Exhibit #1694 (Vol. 2), letter of February 28, 1995, S/Sgt. Ches MacDonald to Herman Felderhof.

had to be returned to its owner, Curragh Inc. By this time, Curragh Inc. had been placed into receivership. Peat Marwick was its receiver. As such, it had the authority to deal with the property of Curragh Resources Inc.

In early December 1993, the RCMP and the Crown considered their options. They could either return the items to Peat Marwick and then re-seize them with a new Search Warrant, or simply contact the receiver to see if they would consent to having the RCMP retain the exhibit. Peat Marwick was agreeable and the Consent Agreement resulted. During the hearing of the stay application, S/Sgt. MacDonald testified that the RCMP did not want to return the dust samples to Curragh since it was valuable evidence and had to be protected.

There can be no doubt that through the materials disclosed to the accused, they were clearly aware of the fact that coal dust samples had been seized, analyzed at the CANMET Laboratory in Ottawa, and were in the possession of the RCMP. In our opinion, the Consent Agreement was neither relevant nor material. No request was ever made by either of the defence team for information as to the exact whereabouts of the coal dust samples. No official request was ever made for access to the samples for independent testing under s.605(1) of the *Criminal Code*.¹⁹¹

Oral Hearing

During the oral hearing of the appeal the members of the panel of the Nova Scotia Court of Appeal pointedly asked on a number of occasions for either defence team to demonstrate to them anything that they were not provided that prejudiced them - i.e. that was in fact material. Counsel were invited to not just deal with the examples mentioned by the trial judge, but also any others that they may care to mention. The defence conceded that they had to show prejudice by the alleged non-disclosure. They were unable to demonstrate any prejudice other than, perhaps, wasted preparation time.

¹⁹¹ The defence team for Mr. Parry were provided with portions of the coal dust for independent testing in January 1995.

Given the material before the court and the oral submissions, it was not surprising that the court was able to return later in the day on December 1, 1995, and deliver an oral decision. Hallett J.A., speaking for the court, concluded that the call by Justice Anderson to Mr. Herschorn demonstrated an appearance of bias that incurably infected his decision on the stay. In addition, he said:

... The learned trial judge failed to make an inquiry and a proper determination whether evidence that not been disclosed or was disclosed late was material to the Respondent's ability to make full answer and defence as the trial judge was required to do. (R. v. O'Connor (H.P.) (1994), 42 B.C.A.C. 105; 67 W.A.C. 105; 89 C.C.C. (3d) 109 (C.A.)). In fact, the learned judge out rightly refused to consider evidence that the Crown wished to tender on this issue. Without having decided that the evidence was material, the learned trial judge failed to exercise his power to grant a stay in a judicial manner; (iii) stays of proceedings are only granted in the clearest of cases. (R. v. Power (E.), [1994] 1 S.C.R. 601; 165 N.R. 241; 117 Nfld. & P.E.I.R. 269; 365 A.P.R. 269; R. v. Burlingham (T.W.), [1995] 2 S.C.R. 206; 1801 N.R. 1; 58 B.C.A.C. 161; 96 W.A.C. 161; 97 C.C.C. (3d) 385; 124 D.L.R. (4th) 7). This was not such a case.

*There was substantial disclosure by the Crown; the incidents of non or late disclosure related to evidence that was not shown by the Respondents to be material to the Respondent's ability to make full answer and defence. Rather than staying the proceedings, the learned trial judge ought to have either declared a mistrial or granted an adjournment of sufficient duration to allow the defence to pursue the newly disclosed or previously undisclosed evidence...*¹⁹¹

Comments by the Supreme Court of Canada

As noted earlier in our report, the defence teams for Mr. Phillips and Mr. Parry appealed the order for a new trial to the Supreme Court of Canada. By a majority of 7 to 2 the appeals were dismissed and the Court of Appeal's order for a new trial upheld.

¹⁹¹ *R. v. Curragh Inc. et al*, 146 N.S.R. (2d) 161, at p. 162.

The majority judgment was written by LaForest and Cory JJ. They concluded that the Crown's submissions that the actions and words of the trial judge revealed actual bias may well be correct, but that it was not necessary to consider the issue as it was clear that the trial judge's actions certainly had given rise to a reasonable apprehension of bias. They wrote that the trial judge had interfered with the Crown's conduct of the case and had become inappropriately involved in the fray. Because of the reasonable apprehension of bias, the trial judge had no further jurisdiction in the proceedings and his order for a stay was null and void.

The majority were careful to refrain from commenting on the issues or evidence that would face the trial judge at the new trial. They wrote:

[12] It is important that a new trial be held, and as a result as little as possible should be said regarding the issues that may arise or the evidence. Like our colleagues Justices McLachlin and Major, we have carefully considered the facts. We refrain from commenting upon them. We do this so that the judge presiding at the new trial is not inhibited in any way in dealing with any of the issues that may arise. Particularly the trial judge should not be inhibited either by our colleagues' view of the evidence and issues or ours, which could well be different. At the new trial, both the Crown and the defence can take whatever steps and raise whatever issues they consider appropriate. The trial of these accused like all who face criminal charges should be fair and be perceived to be fair. To achieve this goal the issues raised at the new trial and the facts upon which they rest must be determined by a judge who is not only impartial but is seen by all to be impartial. This is clearly in the best interests of the accused and the community.

Sopinka J. wrote a concurring judgment, but added that he agreed with the dissent that the breach of the Crown's obligation to disclose was egregious.

McLachlin and Major JJ. wrote a lengthy dissenting judgment. They started with the premise that the history of the proceedings against the two accused created the impression of a prosecution

seemingly prepared to obtain a conviction at all costs.¹⁹¹ They then set out what they referred to as a detailed examination of the facts to ensure that this "impression" was supported by evidence.

We have carefully reviewed the recitation of facts set out by the dissent. In our opinion, with all due respect, there are several serious errors. Some of the errors are relatively minor; others are of more significance.

The dissent noted that on October 21, 1992, defence counsel for Mr. Phillips made his first request for full and complete disclosure in a letter sent to John Pearson, the Director of Public Prosecutions, who was acting as the lead prosecutor for the offences under the *Occupational Health and Safety Act*. This was referred to as being the first in a series of requests for full disclosure which were never fully complied with. The request was far ranging. It detailed a demand for copies of all documents in the files of the Department of Labour, whether or not they were pre or post the explosion and whether or not they were a part of the Department of Labour investigation; all documents gathered by the RCMP; and all documents in the files of the Department of Natural Resources and Department of Economic Development.

Mr. Pearson responded on November 6, 1992, providing two volumes of disclosure of the Department of Labour investigation. In relation to materials in the possession of other government departments, he wrote:

You have asked for access to all documents pertaining to the Westray mine in the files of the provincial departments of Labour, Natural Resources and Economic Development. These files are not in my possession. I suggest you directly approach these government departments with your requests.

¹⁹¹ 113 C.C.C. (3d) 41 at p. 49.

Throughout November and December 1992, and early January 1993, Mr. Pearson responded in an appropriate and timely fashion with respect to providing further disclosure materials, sometimes on request and other times without.

Requests were also made by Mr. Parry's counsel for disclosure.

Despite the fact that on November 30, 1992, Mr. Pearson had pointed out to the defence that a copy of all documents relevant to Westray were, by order of Justice Richard, delivered to the inquiry, Mr. Pearson pursued disclosure with the relevant government departments. On January 15, 1993, Mr. Pearson wrote to the Deputy Ministers of Labour, Natural resources, and Economic Development, asking whether or not their respective departments had made copies of the relevant materials and whether they were prepared to provide access to those materials to the defence. This was followed-up by Mr. Pearson with a letter to the Deputy Minister of the Department of Labour dated January 21, 1993, broadening the request.

This chronology is important because the dissenting judges emphasized the request made by counsel for Mr. Phillips on January 18, 1995, part of which stated:

Particularly we are concerned that the Crown has still not disclosed material compiled by the Department of Labour concerning the mine in the May 9th explosion. We take the position that the Crown is singular and it is part of the Crown's obligation to disclose, any information in the Department's possession must also be disclosed.

The dissent stated that:

January 30, 1995 - for the first time, defence counsel received notice from the team of Crown Attorneys that they did not agree "that the Crown is singular" and accordingly, that the files of the Department of Labour were not, for the purposes of disclosure, in the possession of the Public Prosecution Service."¹⁹³

¹⁹³ *R. v. Curragh Inc. supra*, p. 495.

Obviously this was a crucial issue. For the defence to be aware for the first time, less than a week before the commencement of a 6-8 month trial of this complexity, that the Crown did not view their disclosure obligation as including Department of Labour materials would be starkly unfair.

Included in the trial record was ample evidence that the defence were obviously aware that the Public Prosecution Service team did not consider materials that were in the possession of the Department of Labour to be in the possession of the Crown for purposes of disclosure obligations.

First of all, during the *Occupational Health and Safety Act* proceedings, an application was brought on behalf of Messrs. Parry and Phillips on January 22, 1993,¹⁹⁶ alleging *inter alia* defects in the information. There was also a request for an order for particulars, as well as a request by all three of the defendants for an order requiring the Crown to make further disclosure of materials from other government departments. This specific issue was addressed at length in the Crown's brief, pointing out that materials in the possession of government departments are not within the possession of the prosecuting authorities. Judge MacDonald dismissed the application:

The defendants alleged an adequate and incomplete disclosure on behalf of the Crown. They suggest and order for the Crown to exercise its authority to obtain relevant and available information from other government departments and/or from the RCMP.

As we all know, the RCMP has not laid the information against the defendants. The charges are indeed under the Occupational Health & Safety Act. There is no evidence before me that the RCMP are collaterally involved in the herein charges.

Before me, there is no identifiable or defined information the defence counsel seeks, other than in broad and general terms.

¹⁹⁶ Gordon Kelly was counsel for Gerald Phillips on the application. Robert W. Wright, Q.C. was counsel for Roger Parry.

The burden is on the defendants to prove by credible evidence on a balance of probabilities that they are entitled to an order of this court further disclosure by the Crown.

At this point in time, I am dismissing this application; however, disclosure is an ongoing matter and it certainly does not preclude the defendants from making further application during the course of these proceedings.

(Decision released February 11, 1993,
Appeal Book, Volume 44, p. 12703)

Secondly, we note the Policy Directive issued by the Attorney General of Nova Scotia on February 15, 1994, which stated:

Where the defence requests access to material not in the possession of the investigator or Crown Attorney but in the possession of another agency, government department, or other person, the defence should be advised that the request can be made directly to the relevant agency, government department, or other person.

It is incontrovertible that all defence counsel were well aware that the Public Prosecution Service was bound by the Policy Directive cited above. No request was made by the defence until January 18, 1995. It was an issue that was never raised in any of the pretrial conferences on September 2, 13, 27, 1994, October 18, 1994, November 15, 1994, December 2, 1994, and December 23, 1994. Even after the Crown wrote to the defence on January 30, 1995, and took active steps to assist the defence in facilitating access to the Department of Labour records, the issue was not raised with the trial judge during the pretrial conference of January 31, 1995. The only comment made by the defence was by Mr. Clarke, of counsel for Mr. Phillips, that they wanted to "flag at the moment" that they were obtaining a copy of a particular report from the Department of Labour. The Crown specifically explained its position to the trial judge, and nothing further was made of it until much later in the trial.

It is not necessary to resolve the issue as to whether or not the prosecuting authorities, for the purpose of disclosure obligations, as a matter of law, have in "their possession" materials that exist in other government departments. If the defence truly wanted access to those records and materials, they had an obligation to bring this issue to the attention of the trial judge¹⁹⁶ at the earliest possibility. Not only did they not do that, they never even made the suggestion to the prosecuting authorities until January 18, 1995. What is important is that the position of the prosecuting authorities was in accord with the Directive of the Attorney General of Nova Scotia and the case law in the province.¹⁹⁷

The dissenting judgment made reference to the disclosure of 17 new files of documents that had been in the Crown's possession for two years. This was described as a unilateral decision that there would be no disclosure of these materials and that the prosecution had deliberately withheld them. These were the Cardinal River Coal materials.

¹⁹⁶ Access to materials at the Westray Commission of Inquiry was raised during one of the pretrial conferences by the defence team for Mr. Parry. Although the trial judge offered to assist, access was resolved by discussions between the defence and the Westray Commission of Inquiry directly. It appears that the Crown was first aware that they could have access to the Westray Commission of Inquiry reports, other than by way of Search Warrant, by a media report in early January, 1995.

¹⁹⁷ See for example, *R. v. Ryan* (1991), 103 N.S.R. (2d) 193 (N.S.S.C.) overturned for different reasons (1991), 107 N.S.R. (2d) 357 (N.S.C.A.) and by other authority *R. v. Gingras* (1992), 71 C.C.C. (3d) 53 (Alta. C.A.); But in situations where there is a "joint investigation" by police and personnel from a government department, all the information generated must be disclosed: *R. v. Arseneau* (1994), 93 C.C.C. (3d) 111 (N.B.C.A.). Furthermore, in the report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussion, chaired by the Honourable G. Arthur Martin, Q.C. (1992), it was recommended that the Ontario guidelines for disclosure contain the following policy:

Information in the possession of bodies, such as boards, social agencies, and other governmental departments, is not in the possession of Crown counsel or the investigating agency for disclosure purposes. Where Crown counsel receive requests for information not in their possession or the possession of the investigative agency, the defence should be so advised in a timely manner in order that they may take such other steps to obtain the information as they see fit.

No review of these documents was ever carried out by the trial judge or any other court. The evidence before the trial judge was that the Crown had examined the material and had considered it not to be relevant. When the defence raised the issue about the Crown calling "bad character" or "similar fact" evidence, it caused the Crown to re-examine these materials, and out of abundance caution, it disclosed them. We have examined these materials. In our opinion, the Crown was correct. They were of marginal relevance in light of the evidence and issues at trial. **Furthermore, the Crown had, in fact, disclosed the existence of and the essence of information contained in these files on October 20, 1994.** No inquiry whatsoever was carried out by the trial judge to determine if this late disclosure was material.

The dissenting judgment also relied heavily on the RCMP's role in assessing what was relevant and should be disclosed. In particular, the dissent was highly critical of the Crown's conduct with respect to the 444 "administrative files." It was referred to as being "demonstrative of their behaviour throughout the trial."¹⁹⁸

To substantiate the suggestion that the Crown displayed an unacceptable attitude, the dissent referred to the content of Mr. Felderhof's memorandum of April 13, 1995, to Mr. Theuerkauf. In particular, the dissenting judges believed that this memorandum was written in relation to the late disclosure of the 444 "administrative files." They wrote:

[88] Eventually, these "administrative" files were all disclosed to the defence. The fact of their non-disclosure demonstrates a serious failure to comply with the duty resting on the Crown. However, the Crown's attitude about and response to this obligation is disclosed in Mr. Felderhof's memo of April 13, 1995, to Mr. Theuerkauf. It states:

... I feel it is extremely important to downplay any possible significance of this disclosure. I feel it should be made clear to them that the materials were initially deemed irrelevant by Staff Sgt. MacDonald and placed in his administrative files. Further that the Crown deemed the administrative files not to

¹⁹⁸ *R. v. Curragh Inc.*, *supra*, p. 503.

be relevant and that we did not peruse same. Subsequent to those files being made available, that Staff Sgt. MacDonald had an opportunity to review same and discovered these materials which he brought to our attention; we reviewed these and felt that they should be disclosed in accordance with the provisions of Stinchcombe, which calls for continuing disclosure ...

* * * * *

I feel it is extremely important that this issue be downplayed as much as possible and that it is nothing more than continuing disclosure, and that we do not in any way, shape or form acknowledge or admit any failure or error on the part of the RCMP or our office.

* * * * *

This is very important, not only with respect to the presentation before the Judge, but also as it may appear to the media. We must be seen as presenting something of little or no significance. My contact with the media subsequent to that will confirm this position. (Emphasis in original.)

This memorandum was written in contemplation of a motion for a stay of proceedings being made by the defence. It should be read in light of Crown counsel's submission in open court on February 21, 1995, that the prosecution had looked at these files and deemed them irrelevant. No member of the prosecution team had ever looked at these files until after their existence was disclosed to the defence. Only then did the Crown look at these 444 files and belatedly discover that they should have been disclosed pursuant to R. v. Stinchcombe, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1. This memorandum demonstrates an unusual attitude on behalf of Crown counsel that is not compatible with their responsibilities and critical role in our justice system. This evidence eventually was before the trial judge in the stay of proceeding.²⁰⁰

(emphasis in original)

There is certainly language in the Felderhof memorandum that could be viewed as displaying questionable judgment and philosophy. However, an examination of the records before Justice Anderson puts this memorandum in an entirely different context.

²⁰⁰ R. v. Curragh Inc., *supra*, p. 504-5.

As a result of the "late disclosure" of the Cardinal River Coal materials, the defence team for Mr. Parry wrote to Mr. Felderhof on February 3, 1995, requesting a listing of all material in the possession of the Public Prosecution Service or in the possession of the police, even if considered to be clearly not relevant. This letter was copied to the defence team for Mr. Phillips.

Mr. Felderhof replied on February 6, 1995, to a number of issues, including the request for a list of material in the Crown's possession, even if clearly not relevant. He advised that this would include "administrative matters, professional opinions by police and Crown, working notes, and some records with respect to Curragh's receivership." This letter was also copied to the defence team for Mr. Phillips.

On February 12, 1995, the defence team for Mr. Phillips wrote to Mr. Felderhof requesting a complete list of all material in possession of the Crown and the police that had not been disclosed as part of the RCMP total Exhibit List or the Q & A database. The letter also referred to some specific requests, including the request about Mr. Phillips' file with respect to General Monitors. S/Sgt. Ches MacDonald wrote to Mr. Felderhof on February 20, 1995, expressing confidence that complete disclosure had been made. He pointed out that it should be appreciated that this was a massive file with a lot of duplication, but if the accused felt that there was something that had not been disclosed, he encouraged them to be specific.

S/Sgt. MacDonald wrote a further (and lengthy) letter on February 28, 1995, to Mr. Felderhof, following up on the suggestion about the Crown disclosing material "not considered relevant." He set out in the 7-page letter, with 3 appendices, a complete description of how the RCMP file had been organized, both with respect to investigative files and administrative files. An examination of the listing of these files shows that many of them were indeed merely administrative in nature -- for example, files in relation to press releases, correspondence with the Crown, and overtime records. In addition, there was a large amount of duplication of the content of the so-called administrative files in material that had already been disclosed. This letter of February 28, 1995, was provided to

the defence on March 9, 1995. The delay in forwarding it to the defence is quite understandable in light of Justice Anderson's telephone call to Mr. Herschorn of March 2, 1995.

The letter to the defence enclosing this detailed listing of materials in the administrative and investigative files of the RCMP was sent on March 9, 1995, and offered the defence the opportunity to review these materials and copy the contents of any of them.

The first time there was a request to examine these files was by way of a letter dated **May 1, 1995**, that set out a detailed listing of files the defence wished to examine. It was subsequent to that examination that the defence claimed that there was relevant and material information in the so-called "administrative files" that ought to have been disclosed to them. **The Felderhof memorandum of April 13, 1995, had no bearing whatsoever to the disclosure of the so-called administrative files.**

An examination of the record makes it evident that the memorandum had to do with materials that were being disclosed on April 13, 1995, and the discovery by the Crown that this material, according to their work to date, had been almost wholly disclosed in other documents. The following is a brief chronology:

- On January 24, 1995, the defence team for Mr. Phillips wrote to Mr. Theuerkauf a one paragraph letter: "We hereby request copies of all field notes made by any Crown expert which attended at the mine site. This request is made as part of our ongoing request for Crown disclosure."
- January 30, 1995, Mr. Theuerkauf wrote to Mr. Clarke a lengthy letter, which included a response to the request of January 24, 1995, for field notes of Crown experts who attended the mine site. He wrote:

To the Crown's knowledge the experts who attended the mine site included Steve Farrell, Ken Richmond, and Ian Muirhead. I have requested S/Sgt. MacDonald to obtain copies of any field notes made by those witnesses. Should you be aware of any other experts being called by the Crown that attended at the site, please advise and the Crown will obtain same.

- Mr. Theuerkauf wrote to the defence team for Mr. Phillips on March 9, 1995. Included in that letter were the field notes for Mr. Richmond and Mr. Muirhead.
- On April 7, 1995, Mr. Theuerkauf wrote to the defence team for Mr. Phillips with respect to a number of outstanding requests. Included in that letter was the following paragraph:

In correspondence dated February 13, 1995, and January 24, 1995, Mr. Clarke requested copies of field notes of Crown experts who attended at the Westray mine site. My response of January 30, 1995, included the experts who attended the mine site and that S/Sgt. MacDonald had been requested to obtain copies of same. On March 9, 1995, you were provided with the field notes of Messrs. Richmond and Muirhead. The police and the Crown are still awaiting receipt of Mr. Farrell's field notes which are under subpoena (duces tecum).

- In a letter dated April 11, 1995,²⁰⁰ S/Sgt. Ches MacDonald wrote to Mr. Theuerkauf. He advised Mr. Theuerkauf that he had found materials that Mr. Farrell had prepared when he was hired to assist the RCMP in conducting the extremely dangerous re-entry into the Westray mine between September 17, 1992, and October 1, 1992:

²⁰⁰ After the recusal proceedings of March 9, 13, and 14, and the subsequent attempts by the Crown to appeal, the trial recommenced before Justice Anderson on April 10, 1995.

The defence asked a while ago for mine site field notes of experts LINEY, RICHMOND, and MUIRHEAD and FARRELL. I have provided you with mine site field notes from MUIRHEAD and RICHMOND. LINEY did not attend at the mine site, therefore, no notes. I requested that FARRELL provide me with his field notes, however, they have not been received as yet. When I provided you with a description of the case file in this investigation, you will recall that I had advised that there were files dealing with the execution of a Search Warrant at the Westray mine site between 92-09-17 and 92-10-01. I realized recently that these files could contain some notes of FARRELL as he was the mining engineer hired to provide professional advice during the execution of the Search Warrant.

I have carefully reviewed the file documentation compiled by FARRELL and realized that the following may be of assistance to the court in this trial.

S/Sgt. MacDonald then set out a list of things in the file, including hand-drawn maps and notes made by Mr. Farrell on them, along with notes of observations made by miners who had gone underground during the execution of the Search Warrant.

- On the same day that the memorandum of April 13, 1995, was written by Mr. Felderhof to Mr. Theuerkauf, Mr. Theuerkauf wrote to the defence team for Mr. Phillips:

In the past you requested copies of field notes of Crown experts who visited the mine site. Previously the Crown has provided you (and Ms. Malick) with field notes from Messrs. Muirhead and Richmond and indicating Mr. Farrell's to be pending. Although this remains so, S/Sgt. MacDonald did review RCMP files at Pictou Detachment regarding its search of the Westray mine site conducted from September 17 through 30th. Mr. Steve Farrell was the engineer who oversaw that operation. S/Sgt. MacDonald has provided the attached documents and maps.

Mr. Theuerkauf also enclosed a copy of S/Sgt. Ches MacDonald's letter of April 11, 1995, and all attachments.

This chronology makes it clear that the concern over recent disclosure was not about the 444 administrative files, but rather about the maps and notations made thereon by Mr. Farrell concerning the re-entry into the mine to execute the Search Warrant in September 1992. The full text of the memorandum of April 13, 1995, sets out why the Crown intended to downplay any anticipated complaint by the defence -- that is, that all of this information had already been disclosed. Although the dissenting judgment in the Supreme Court of Canada did refer to parts of the memorandum of April 13, 1995, it is useful to set out other comments in the memorandum which demonstrate why the Crown was concerned and the reason for its position:

Re: Disclosure - April 13, 1995

As we have discussed, it is expected by all team members that Messrs. Kelly and Clarke and possibly counsel for Parry as well, will complain vociferously with respect to the recent disclosure as well as possibly make an application for a stay of proceedings. As per our discussion, I feel that any prejudice to the accused is more apparent than real given that the material disclosed has substantially in fact almost wholly disclosed [in] the materials already in their possession. Factually, I feel it is almost [sic] extremely relevant that this material was available to them for perusal at the Pictou Detachment for quite some time: and they failed to exercise their right to peruse same. By way of background, should the matter have come before the court by way of argument, I feel it is extremely important to downplay any possible significance of this disclosure. I feel it should be made clear to them that materials were initially deemed irrelevant by S/Sgt. MacDonald and placed in his administrative files. Further, that the Crown deemed the administrative files not to be relevant and that we did not peruse same. Subsequent to those files being made available, that S/Sgt. MacDonald had an opportunity review same and discover these materials which he brought to our attention: we reviewed these and felt they should be disclosed in accordance with the provisions of Stinchcombe, which calls for continuing disclosure. Andy is presently researching this information with respect to previously disclosed materials and has found that to date a vast

majority has in fact been previously disclosed; he has not completed his research and I suspect that once completed, that very little new information has come to light. The research by Andy shall be extremely helpful in the event defence counsel attempts to pull out any particular document and suggest it is new material as Andy's notes will reflect the Q & A number or possibly a source already in their possession.

I feel it is extremely important that this issue be downplayed as much as possible and that it is nothing more than continuing disclosure, and that we do not in any way, shape or form acknowledge or admit any failure or error on the part of the RCMP or our office.

As discussed with you, a very small brief in the law might be useful to have in existence if the matter is raised on Tuesday of next week. I would think that the basic principles as set out in Stinchcombe as to continuing disclosure, as well as perhaps a case or two with respect to the fact that a stay of proceedings is an extremely rare remedy used by the courts and should not be used unless very extreme circumstances. I feel it will be important to suggest a remedy of possible recall of one witness, namely Harry Ulock, who I understand is already under possible recall, and that the information in question, what little there is that's new, has had no bearing on previous witnesses and only relevant with witnesses to be called some time in the future.

It is important that we do not ask for an adjournment and that the argument be presented immediately upon the complaint. As discussed, I would ask that you present the argument given your knowledge of disclosure to date, as well as your present rapport with Judge Anderson, which seems to be substantially better than mine and Peter's.

In the presentation, might I suggest that we do not appear to be defensive in any way, shape or form; and that the Crown's argument be presented in a matter of fact manner as coolly and calmly as possible. This is very important, not only with respect to the presentation before the judge, but also as it may appear to the media. We must be seen as presently something of little or no significance. My contact with the media subsequent to that will confirm this position.

Should you have any questions please don't hesitate to call me.

(underlining added)

Fet

Placed in its proper context, the Crown's concern was understandable: an award of costs had already been made against the Crown for the alleged non-disclosure of the Cardinal River Coal material; the Crown had brought a recusal motion asking the trial judge to declare a mistrial, and they had just received from S/Sgt. Ches MacDonald maps and notations made by Steve Farrell during the execution of searches at the Westray mine in September 1992. These materials were forwarded to the defence on April 13, 1995. While the language used was perhaps not the best, when placed in the context that the material being disclosed on April 13, 1995, had, according to the Crown's researches to date, in fact been previously disclosed, it loses its sinister connotation.

In fact, the defence, when given this so-called "recent disclosure," at no time made any complaint to the court, nor at any time before or during the stay of proceedings application (notice of which was informally given for the first time on May 9, 1995), nor before the Nova Scotia Court of Appeal or the Supreme Court of Canada. In addition, it is interesting that neither defence team made reference to the memorandum of April 13, 1995, in the stay of proceedings application before Justice Anderson.; nor did they dispute the explanation that was given to the Nova Scotia Court of Appeal about the true context of the memorandum of April 13, 1995.²⁰¹ ²⁰²

The dissent went on to stress the fact that the Court of Appeal rendered a decision within two hours of the close of argument. In addition to other references to this point, the judges wrote:

The Court of Appeal within two hours of the close of argument held that the trial judge "failed to make an inquiry and a proper determination whether evidence that had not been disclosed or was disclosed late was material to the respondent's ability to make full answer and defence" as he was required to do. It is impossible to determine upon what the basis the Court of Appeal reached that conclusion. The trial judge's reasons are detailed and clear. He

²⁰¹ It was subsequently confirmed by the Crown to the defence team for Mr. Phillips that Mr. Farrell made no field notes during his visits to the mine sites (April 28, 1995).

²⁰² In addition, S/Sgt. Ches MacDonald, the only person questioned about the content of the memorandum of April 13, 1995, testified at the stay application that the memo was referring to Mr. Farrell's notes. Appeal Book vol. 21, p. 6240.

looked at several examples of late and non-disclosure and found that they may have disclosed possible defences to the accused. He obviously made both an inquiry and a proper determination. We reiterate the findings by the trial judge (at paras. 91 and 94):

The above noted examples not of late disclosure but of non-disclosure, matters which would have assisted the applicants and would have undoubtedly affected a full answer and defence.

.....

I find that the lack of disclosure and non-disclosure, the timing of disclosure and the nature of the disclosure amounts to an infringement of the s.7 right to make full answer and defence and infringes on the right of a fair trial. Such a breach demands a remedy under s. 24(1) of the Charter.

To the extent that the Court of Appeal thought otherwise, we respectfully disagree.

Within the brief period of its deliberation it is unlikely the Court of Appeal had time to assess the materiality of the mountain of evidence that was not disclosed. The Court of Appeal assumed the trial judge had to have been mistaken. In doing so, the Court of Appeal disregarded the principle of deference to the trial judge. There was so much that was not disclosed or was disclosed late, that it defies credibility to think there was no material information involved.²⁰³

When Justices of the Supreme Court of Canada come to conclusions and express themselves as stridently as the dissenting judges did, with respect, the question must be asked how they could have arrived at these conclusions. Although any answer must, of necessity, be somewhat speculative, there are certain facts that do point convincingly to an answer.

²⁰³ *R. v. Curragh Inc.*, supra, p. 509-10.

Any case that comes before the Supreme Court of Canada must be narrowed down to its essence. The demands on the court's docket are extreme. In an effort to force conciseness and focus, limits are placed on the written and oral arguments.

Written arguments are limited to 39 pages; oral argument to 1 hour in chief and 5 minutes to reply. The total oral argument before the Supreme Court of Canada for this appeal took less than 3 hours. McLachlin and Major JJ. asked no questions of any of the counsel. Craig Garson, Q.C., who appeared for the Crown, focused his submissions on the real issue before the Supreme Court of Canada, i.e. whether or not the bias or reasonable apprehension of bias incurably infected Justice Anderson's order for a judicial stay of proceedings.

Not before the Supreme Court of Canada were the written arguments that had been filed before the Nova Scotia Court of Appeal, nor the transcript of 15 hours of oral argument that dealt in considerable detail with each and every allegation of late and non-disclosure and the ability of the Crown to demonstrate, based on materials that were on the record, but which Justice Anderson refused to consider, that these were not material. It was specifically conceded that the Crown had made errors in fulfilling its disclosure obligation, but that such errors were inadvertent. Had the defence been prejudiced by such failures, other remedies, such as adjournments, a declaration of a mistrial and/or costs were the appropriate remedies.

We had earlier quoted one of the dissenting judgment's concluding paragraphs that summarized the judges' views of the Crown's conduct. They wrote:

The present case is not simply about Crown non-disclosure. This case is about the appearance of justice. Throughout the proceedings the Crown bent and broke rules, and attempted to cover up when it was caught. The Crown actively misled the court, on a number of occasions. The Crown ignored or failed to obey court orders. It is unnecessary to repeat the litany of abuses that have already been described. The entire proceedings were tainted by prosecutors who were playing to an enraged public, and playing to win. That this is apparent can be seen from the internal memo that passed between

*prosecutors referred to by the trial judge and in these reasons. To win is not the role of the prosecutor, to win at all costs is an affront to the Canadian justice system. Court should not tolerate activities which demonstrate this attitude. The conduct of Crown counsel at the trial violates the fundamental principles that underlie the communicates sense of fair play and decency and constitutes an abuse of the court's process.*³⁰⁴

We have examined all of the material relevant to the conduct of the trial. With all due respect to the dissenting justices of the Supreme Court of Canada, we could find no evidence that the Crown bent and broke rules or attempted to cover up when it was caught; nor that the Crown ever knowingly or actively misled the court, let alone on a number of occasions; nor that the prosecutors intentionally ignored or failed to obey court orders. Furthermore, we could find no evidence that the prosecutors were playing to an enraged public and playing to win. The only "evidence" relied upon in the dissent was the internal memorandum of April 13, 1995. Unfortunately, the Court did not have before it the evidence that clearly demonstrated the true context and meaning of that memorandum.

This is not to say that we endorse as proper how the Public Prosecution Service approached this trial and how it was conducted. It is indisputable that the Public Prosecution Service did not commit the necessary resources to the proper presentation of the evidence they had available to them. The very lack of resources, in terms of manpower and experience, precluded the Crown from taking the appropriate steps to ensure that it had reviewed the documentation and had the appropriate documents to be entered at trial. The first prosecution team knew that it was "thin," yet lost the most computer-literate member of the team (Andrew Macdonald) for close to six months, and this at the crucial time period leading up to preparation for trial. The first prosecution team did not request additional resources. They took the philosophical approach that they had to deal with the hand that had been dealt them and do the best with what they had.

In addition, it is plain that a personality conflict developed between the members of the prosecution team and the defence team for Mr. Phillips. No one should be "blamed" for that development. It

³⁰⁴ *R. v. Curragh Inc.*, supra, p. 517.

did nothing to assist the Crown in terms of its appearance of being uncooperative. Given the size of the file and its complexity, the first trial team should have realized that it was not ready for trial. Furthermore, the accepted principles of trial preparation were not followed.

In our opinion, the evidence available to the prosecution team made the case against Messrs. Phillips and Parry a prosecutable one and the trial should have been able to have been completed on its merits. It is easy to see why the defence teams and Justice Anderson were frustrated by the Crown's seeming inability to track down the appropriate documents. However, the overall reason that the trial did not come to a completion on its merits was the refusal by the trial judge to conduct a proper inquiry into the alleged non or late disclosure, and by the defence not bringing to the attention of the trial judge at the earliest opportunity what they later complained about so vehemently.³⁰⁵

SECTION IX: SUMMARY

The Westray disaster required a demanding investigation and an exacting prosecution effort. As Tideswell articulately wrote:

*An explosion is the nearly perfect criminal; it never confesses, seldom spares an eyewitness, and destroys most of the circumstantial evidence it might otherwise leave.*³⁰⁶

With the emphasis on safety in coal mines, for a mining disaster to occur, many things have to go wrong at the same time. There is usually no one reason that can be identified as being the sole cause of a mining disaster. It is the convergence of a number of failures.

³⁰⁵ In particular, the defence team for Mr. Phillips knew as of December, 1992, that the Public Prosecution Service took the view that materials in possession of the Westray Commission of Inquiry, the Department of Labour and other government departments were materials not "in the possession of the Crown" for disclosure purposes. This was reaffirmed by the issuance of the Attorney General's Directive on Disclosure dated February 15, 1994.

³⁰⁶ F.V. Tideswell "Methods of Examination Following a Colliery Explosion" [1952-53] 112 Transactions - The Institution of Mining Engineers 158 at p. 166.

In a similar fashion, there is no one reason that can be said to have caused the failure of this prosecution to arrive at a verdict on the merits. Like the explosion that triggered the investigation and prosecution, the failure was caused by the convergence of numerous factors. In our opinion, some of the difficulties were unavoidable. The best example is the fact that the dangerous conditions in the mine and the inaccessibility of the north mains made an extensive forensic examination difficult if not impossible.

It is our opinion, that however ill advised, short-sighted (or even deliberately mischievous, which there is no evidence to suggest) the inadequate resourcing of the prosecution effort up to March 1993, did not bring about the ultimate result. It did have a role to play, but a more subtle one.

It had an impact on the ability of the PPS to staff the prosecution. The first prosecution team had neither the experience nor training to handle the Westray prosecution. This is not a condemnation of the team members who served on that team. It is a systemic problem that stems from the PPS's hiring system and lack of training. Staffing tends to be maintained at the level that current case loads demand. There is rarely extra personnel available to meet extraordinary demands. In addition, the staff that is available is spread throughout several small offices in the province, with the largest concentration of lawyers working out of Halifax.

As noted in the June 1999 report by the Honourable Fred Kaufman, the more senior litigators of the Service have moved into management positions and, to the extent that they are able to take on case work, are stretched thinly. Essentially, there are too few senior Crown counsel available to provide the kind of experience a special prosecution requires.

Mr. Morris's and Ms. Cleary's memorandum correctly identified the demanding nature of the file and the staff that would be required to prosecute the case. We very much doubt that the staffing of demanding files, let alone the most significant case in the history of Nova Scotia, should have been done by an *ad hoc* request for volunteers. The most appropriate counsel should have been

identified and assigned, if in fact there were such counsel within the PPS at that time.²⁰⁷

At various times, members of the first and second prosecution team suggested that outside counsel be engaged for assistance. This request was not followed up through formal channels. However, the usual reason given why the PPS does not go outside for assistance is that to do so is a recognition that they are unable to do the case: it would be treated as a sign of weakness by the PPS. With all due respect to those who hold that view, such reasoning is faulty.

Reluctance to recognize one's own personal limits might be excused due to the interference of ego. However, the inability or reluctance to recognize the limits of an organization can only be traced to a misplaced allegiance to the repute of that organization.

The duty of the PPS is to the public. It is not to the government of the day, or to the organization, or any individual members of it. If it is in the best interest of the public that outside counsel be retained to advise or conduct litigation for the Crown, the course should be clear. To do otherwise is to put the perceived interests of the organization before the interest of the public. Furthermore, the failure to do so can actually be counter-productive to the very thing that the organization is trying to protect - the repute of the PPS' ability to provide exemplary service to the public. For example, should the PPS insist on handling files that it should not, and the case is not handled well, the public's faith in the PPS is indeed damaged. But if the PPS engages the necessary assistance of outside counsel, who may work in conjunction with one or more regular Crown Attorneys, and the case is handled appropriately, then the public is well served and no one would want to or could effectively criticize the PPS. Its reputation would in fact be enhanced.

Furthermore, in our opinion, the ability of an organization to recognize its limits is far from being a sign of weakness. It is a sign of maturity of thought and strength in being able to understand when the need arises to call in the professional assistance of others. It is common in the private sector for

²⁰⁷ In our opinion, Mr. Pearson himself had the necessary experience and skills, but obviously could not take over the case in light of his management responsibilities.

lawyers to engage counsel from other law firms to provide the skills or resources that they may not be able to provide to the same extent. This occurs because it is recognized that it is the client's interests that must be put first and foremost and not a concern that the client or others may think less of the law firm. This practice happens whether the law firm is a small general practice or a large "full service firm."

For these reasons, we have included a recommendation that the PPS develop a policy of engaging counsel from outside the service, whether from other prosecution services in Canada or from the private bar. In addition, we have recommended that the Special Prosecutions Unit be further expanded to develop and maintain the expertise that an unusually complex and/or large case may demand. It should not be the intention that the prosecution's Special Prosecutions Unit would always be the sole Crown assigned to a case. Rather, the Unit could provide team leaders for cases, with the ability to draw on the assistance of other members of the PPS.

We have identified how the problems of disclosure arose that so plagued the first prosecution effort. Despite the commitment of time and resources to the issue of disclosure, the second prosecution team, as late as September 8, 1997,²⁰⁸ identified that a significant amount of work remained to be done to complete the disclosure process, and that although they believed the Crown to be capable of complying with its disclosure obligation, they recognized that there would be ongoing disclosure and that there may yet be complaints by the defence.

We have little doubt that strides in document management techniques and software will make a significant impact on some of the problems that occurred in the Westray prosecution.

There are two issues that still need to be addressed. The first is the role of the police in the disclosure process. The second is the issue of the extent of the Crown's disclosure obligation regarding information that is in the possession of a third party.

²⁰⁸ This is the date of their Report on Disclosure (Report #2).

During the stay application before Justice Anderson, the defence complained that the Crown's disclosure obligation had been delegated to the police and, furthermore, that the police had applied the wrong test in determining relevancy and hence failed to disclose.²⁰⁹

In our opinion, there is nothing *inappropriate* in having the police carry out the initial determination of relevance. It appears that this process is one that occurs in all Canadian jurisdictions.²¹⁰ In essence, a Crown Attorney is entitled to assume that the police have provided all relevant information unless there is some reason to question that assumption. However, there are potential problems with this practice. The investigator may apply the wrong standards or otherwise err in determining relevance. Non-disclosure may occur and may never be discovered, or only discovered at a time that leads to adjournments, mistrials, or even the entry of a judicial stay of proceedings. If any lesson is to be learned from the Westray prosecution, it is that every prosecution should be handled correctly from the outset.

In 1996, the then Director of Public Prosecutions, Jerry S.T. Pitzul, established an Inter-Agency Working Group on Crown Disclosure.²¹¹ The committee recommended that, despite the resource implications, the investigator, in every case, provide to the Crown Attorney a copy of the entire police file and a detailed inventory of it. To implement that recommendation would require a Directive from the Attorney General to the police requiring preparation of an inventory and the introduction of training for investigators, additional Crown and police staff. It is our information that nothing has been done to implement these recommendations. In our opinion, at a minimum, these recommendations are worthy of implementation at least for all non-routine files.

Even if the recommendation of the Inter-Agency Working Group on Crown Disclosure is not implemented and the initial determinations of relevance, and hence disclosure, is left with the police

²⁰⁹ The dissent in the Supreme Court of Canada also refers to this fact.

²¹⁰ Interagency Working Group on Crown Disclosure Report, April 1997.

²¹¹ The committee was made up of representatives of the Public Prosecution Service, Nova Scotia Association of Chiefs of Police, Nova Scotia Criminal Lawyers' Association, Halifax Regional Police Service, Nova Scotia Department of Justice, and the RCMP.

investigator, there is a serious gap in the protocols that exist with respect to the police investigator carrying out this function. There does not appear to be a Directive from the Nova Scotia Department of Justice to police forces within the province ensuring appropriate police training in order to comply with the Crown's disclosure obligations. The importance of the police role in the Crown's ability to fulfil its disclosure obligations cannot be understated. Its significance is reflected in one of the many recommendations made by the Martin Report:

The committee recommends that the Solicitor General coordinate with federal authorities and that both issue such Directives as are necessary requiring all police forces operating within the province of Ontario to be aware of and comply with the Attorney General's Directive on disclosure and their relations with the Crown prosecutors. These Directives should also make clear that the police and other investigators:

- a) are bound to exercise reasonable skill and diligence in discovering all relevant information, even though some information may be favourable to the accused;*
- b) are under a duty to report to the officer in charge or to Crown counsel all relevant information of which they are aware, including information favourable to an accused, in order that Crown counsel may discharge the duty to make full disclosure; and that*
- c) a failure to disclose all relevant information as required is a disciplinary offence.²¹²*

It should be noted that the Marshall Inquiry made a recommendation that expressed these same principles.²¹³

The second issue that had an impact on the initial entry of a judicial stay of proceedings was the extent of the Crown's obligation to disclose material that was in the possession of the Department of Labour and other government departments. As set out earlier in our report, the RCMP did not carry out searches of the Department of Labour and other government departments. They relied on

²¹² The Martin Report, *ibid.* p. 264-5.

²¹³ Royal Commission on Donald Marshall Jr. Prosecution (1989) vol. 1, p. 244.

the government departments complying with the order to produce all relevant documents to the Westray Commission of Inquiry with the expectation that a search of the Inquiry would capture all relevant documents. During the hearing of the stay application before Justice Anderson, it was evident that although the Crown Attorneys did not exercise access (or even try to) to information or material in the possession in the Department of Labour, there was a significant degree of cooperation offered to the RCMP. The evidence supported the conclusion that if the RCMP wanted information or documents from the Department of Labour, subject to claims of privilege, they would be provided.

We have earlier noted that the first prosecution team followed the Directive on disclosure issued by the Attorney General on February 15, 1994, directing Crown Attorneys to respond to defence requests for access to material not in the possession of the investigator or Crown Attorney, but in the possession of another government department, by directing the defence to make the request directly to the government department involved. This issue was also reviewed by the Inter-Agency Working Group on Crown Disclosure. It was the Committee's conclusion that if the Crown reviews the material in the possession of a third party, they must disclose it, and if they have access to the material but elect not to review it, that there would still likely be an obligation to disclose. The committee recommended that the Attorney General's Directive on Disclosure be amended so that it would read as follows:

*Where the defence requests access to material not in the possession of the investigator or Crown Attorney but in the possession of another agency, government department or other person, the defence should be advised that the request can be made directly to the relevant agency, government department or other person unless the other agency, government department or person constitutes an investigative agency (as discussed in R. v. O'Connor) in which case the Crown, if they have voluntary access to the material, must disclose to the defence in accordance with this directive.*²¹⁴

(emphasis added to show the added wording)

²¹⁴ Inter-Agency Working Group on Crown Disclosure Report, April 1997, p. 60. This obligation would obviously be subject to the provisions, where applicable, set out in s. 278.2 of the *Criminal Code* regarding disclosure of third party records, even when they are in the possession or control of the Crown.

We have noted above that there was no one reason that could be said to have caused the failure of this prosecution to arrive at a verdict on the merits. Amongst the more significant ones are the following:

- The failure to treat the mine as a crime scene and to take the necessary steps to carry out a complete and thorough forensic examination.
- The impact of other investigations.
- The appalling lack of resources provided to the PPS with respect to Westray from 1992 to March 1993.
- The premature laying of charges.
- The systemic deficiencies in securing, cataloguing, and producing relevant documents.
- The lack of adequate resourcing of the first prosecution effort which lead to the failure by the Public Prosecution Service to be properly prepared for trial, including the implementation of systems to ensure disclosure was not going to impede the trial process.
- Failure of the defence team for Mr. Phillips to bring to the attention of the trial judge at the earliest opportunity their allegations that there were materials in the government departments that had not been disclosed.
- The failure of the trial judge to conduct a proper inquiry with respect to the materiality of the late disclosure.

For the second prosecution effort, resourcing was not an issue. The case that they inherited was marred by the first prosecution effort. Great lengths were gone to to ensure that all relevant documents were properly catalogued and disclosed. During the second prosecution effort, the investigative efforts by the RCMP still continued. But the prosecution effort suffered due to the

decision to run a case as legally and factually complex as Westray by consensus with a team of six lawyers. It made the effort unwieldy and at times inefficient.

The effort was further hurt by the scathing indictment by the two dissenting Justices of the Supreme Court of Canada in March of 1997. This led to Mr. Phillips filing a complaint with the Nova Scotia Barristers' Society. The complaint relied solely on the comments made in the dissent. Even though the complaint against Mr. Macdonald was dismissed in October 1997, and against the remaining current and past members of the PPS in February 1998, it caused the team to become divided and it hampered their ability to cohesively work as a team. The prosecution effort was further hurt by the unilateral departure of Mr. Hagell in November 1997, who felt that the case was too complex for the PPS to ever be able to conclude that there would be a reasonable chance of conviction at trial. He felt ethically bound to be asked to be reassigned. Andrew Macdonald also asked to be reassigned, but for the reason of obtaining court experience.

The remaining members of the second prosecution team concluded that the Crown did have a reasonable likelihood of conviction should the matter proceed to trial. This view changed when they received Mr. Liney's letter of March 24, 1998. Within days, the team members set out to draft reasons why the Crown would not be able to proceed to trial while, at the same time, ensuring that they properly understood Mr. Liney's opinions. While other experts did not support Mr. Liney, the remaining team members were not prepared to drop him as a Crown witness. It was entirely the opinions by Mr. Liney, given in the overall context of the case, that led the Crown to conclude that they did not have a reasonable chance of conviction should the Westray prosecution proceed to trial.

We feel that we should not end this report without pointing out the fact that even though our conclusions and comments indicate that the first and second prosecution efforts could have and, in some instances, perhaps should have been handled differently, they should not be taken as a general indictment of the PPS or many of its lawyers who work long hours on difficult matters. It is not

difficult to find many instances of Royal Commissions, Inquiries, or external reviews that have examined the decisions and conduct by Crown officials throughout the common law world. It is a fact that lawyers are not blessed with perfect foresight and that the decision to prosecute, or not to prosecute, can lead to what some believe to be disastrous consequences.²¹⁵

Because such important decisions are necessarily made out of public view, concerns that are raised about the basis for such decisions can only be answered by the extraordinary step of an external examination. It is the willingness of the chief law enforcement officer of Nova Scotia, the Attorney General and Minister of Justice, and those that act pursuant to his power, to carry out such examinations, that help provide appropriate assurances that the government will commit the requisite resourcing for the important work that the Public Prosecution Service is entrusted to carry out, and to be vigilant in insisting that those that actually exercise prosecutorial discretion follow appropriate principles. If either of these two precepts is not followed, the administration of justice and the public's confidence in it will suffer.

SECTION X: SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1.

That the Director of Public Prosecutions and/or the Attorney General formulate a clear statement of principle with respect to the sufficiency of evidence standard to be applied by the Crown.

RECOMMENDATION 2.

That the Director of Public Prosecutions and/or the Attorney General formulate

²¹⁵ More than a few examples are described by John L.I.J. Edwards, The Attorney General of Politics in the Public Interest (1984), p. 410-412; and at p. 417 *et seq.*

Guidelines with respect to the appropriate application of the sufficiency of evidence test.

RECOMMENDATION 3.

That the Province of Nova Scotia undertake an immediate review of legislation as it pertains to occupational health and safety to ensure that investigations involving serious bodily harm or death are conducted by agencies that are independent of the body charged with ensuring regulatory compliance.

RECOMMENDATION 4.

That the jurisdiction to investigate industrial accidents be clearly delineated within the relevant statute(s) and that, preferably, it be entrusted to one agency, likely the RCMP.

RECOMMENDATION 5.

That the PPS consider the retention of consultants or consulting firms in cases involving multi-disciplinary fields of expertise outside the normal realm of PPS experience, to assist in assessing and locating appropriate expert witnesses.

RECOMMENDATION 6.

That the PPS adopt the policy that for every major or complex prosecution a member of the Appeals Branch either be a member of the prosecution team or be assigned to liaise with the team.

RECOMMENDATION 7.

That the PPS advertise throughout the service for Crown Attorneys interested in completing a rotation in the Special Prosecutions Unit for training in the handling of major and complex prosecutions, with the *caveat* that the willingness to join the section

includes the expectation of extraordinary demands with respect to workload and a willingness to work throughout the province, and that there be published known incentives with respect to reclassification and the handling of additional costs associated with these duties.

RECOMMENDATION 8.

That the PPS maintain an up-to-date list of Crown Attorneys prepared to become involved in special cases.

RECOMMENDATION 9.

That the Special Prosecutions Unit develop and maintain an expertise in litigation support technology and software.

RECOMMENDATION 10.

That the PPS develop a protocol for the assembly on short notice of counsel both inside and outside the PPS to provide immediate assistance in complex cases to the police or other investigating agencies.

RECOMMENDATION 11.

That the PPS develop a protocol for all complex or major prosecutions to have the Crown examine the content of the complete police file to ensure disclosure of all relevant information and to ensure that disclosure will be accomplished in a timely and appropriate fashion.

RECOMMENDATION 12.

That the Attorney General of Nova Scotia develop Directives (Standard Operating Procedures) to be issued to all police forces operating in Nova Scotia requiring the police

and other investigators:

- a. that they must use reasonable skill and diligence to discover all relevant information, including information that may be favourable to the accused;
- b. that they are under a positive duty to report to the officer in charge or to the PPS all relevant information of which they are aware, including information favourable to an accused, so that the PPS may discharge its duty to make full disclosure;
- c. that failure to exercise reasonable care in disclosing all relevant information is a disciplinary offence;
- d. that all police forces be required to conduct training with respect to the principles involved and the obligation of the police to disclose all relevant information to the PPS.²¹⁶

RECOMMENDATION 13.

That the PPS develop a policy affirming its commitment of service to the public, including an affirmation of its policy developed in 1998 to engage outside counsel to conduct prosecutions work on behalf of the Crown.²¹⁷

RECOMMENDATION 14.

That the PPS not utilize casual or contract employees, either lawyers or support staff, in unusually large or complex files.

²¹⁶ It is our information that for a major prosecution, the Halifax Police Service and the RCMP frequently assign one officer who is responsible for disclosure. This kind of step is a welcome development, but may suffer if the police are not adequately trained with respect to the appropriate test for relevancy and how to effect disclosure.

²¹⁷ It is important to recognize that the Public Prosecution Service did engage outside counsel on a number of occasions during the Westray prosecution: David Bright, Q.C., to argue the recusal motion and possible appeals arising from that motion, and Craig Garson, Q.C., to act as lead counsel for the Crown on the appeal proceedings arising from Justice Anderson's stay and to handle the anticipated Stay of Proceedings application at the re-trial. Our recommendation emphasizes the fact that the *Public Prosecutions Act* statutorily foresaw the wisdom and/or the need for the Public Prosecution Service to engage counsel outside the Service and that this need should not be one limited to arguing only certain issues in a specific prosecution.

RECOMMENDATION 15.

That the PPS develop a protocol for Crown Attorneys to provide precharge advice to the police and other investigative agencies, such as other government departments.

RECOMMENDATION 16.

That the PPS develop a protocol to engage consultants in complex technical cases, not to act as expert witnesses but rather to give advice on technical matters. (This policy will not, of course, preclude the engagement of expert witnesses.)